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NORTH CAROLINA REPORTS

VOL. 187

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

[v. 187]

FALL TERM, 1923
SPRING TERM, 1924

REPORTED BY
ROBERT C. STRONG

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1 Dev. & Bat. Eq.	"	21	"	6 " "	" 51 "
2 " "	"	22	"	7 " "	" 52 "
1 Iredell Law	"	23	"	8 " "	" 53 "
2 " "	"	24	"	1 " Eq.	" 54 "
3 " "	"	25	"	2 " "	" 55 "
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5 " "	"	27	"	4 " "	" 57 "
6 " "	"	28	"	5 " "	" 58 "
7 " "	"	29	"	6 " "	" 59 "
8 " "	"	30	"	1 and 2 Winston	" 60 "
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1924.

CHIEF JUSTICE:

* WALTER CLARK.

ASSOCIATE JUSTICES:

† WILLIAM A. HOKE,
W. P. STACY,
W. J. ADAMS,
HERIOT CLARKSON.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

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---

* Upon the death of Mr. Chief Justice Clark, Mr. Associate Justice Hoke succeeded him.
† Upon Mr. Associate Justice Hoke succeeding Mr. Chief Justice Clark, Mr. Associate Justice George W. Connor succeeded him.

108159

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
M. V. Barnhill	Second	Nash.
Garland E. Midyette	Third	Northampton.
F. A. Daniels	Fourth	Wayne.
J. Loyd Horton	Fifth	Pitt.
Henry A. Grady	Sixth	Sampson.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
N. A. Sinclair	Ninth	Cumberland.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
A. M. Stack	Thirteenth	Union.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

Walter L. Small	First	Beaufort.
Donnell Gillam	Second	Edgecombe.
R. H. Parker	Third	Halifax.
Clawson L. Williams	Fourth	Lee.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
William F. Evans	Seventh	Wake.
Woodus Kellum	Eighth	New Hanover.
T. A. McNeill	Ninth	Robeson.
L. P. McLendon	Tenth	Durham.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
J. F. Spruill	Twelfth	Davidson.
F. D. Phillips	Thirteenth	Richmond.
John G. Carpenter	Fourteenth	Gaston.
Zeb V. Long	Fifteenth	Iredell.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
J. Will Pless, Jr.	Eighteenth	McDowell.
J. E. Swain	Nineteenth	Buncombe.
Grover C. Davis	Twentieth	Haywood.

LICENSED ATTORNEYS

SPRING TERM, 1924

The following were licensed to practice law by the Supreme Court, Spring Term, 1924:

Abernethy, Oscar Marvin	Charlotte.
Ahearn, Raymond Edward	Charlotte.
Allsbrook, Julian Russell	Roanoke Rapids.
Arnette, John McIntosh, Jr.	Wagram.
Averitt, Ransom Stringfield	Garner.
Beatty, John Day, Jr.	Ivanhoe.
Burns, Robert Henry	Tabor.
Capps, Frank	Raleigh.
Clark, Heber Orlando	Raleigh.
Cowan, Cecil Edmund	Windsor.
Dockery, James Stephen	Durham.
Donnahoe, Jefferson Davis	Asheville.
DuBose, Horace Mallard, Jr.	Charlottesville, Va.
Eley, Alvin James	Woodland.
Fisher, Lewis Joseph	Chapel Hill.
Gardner, Wade Anderson	Wilson.
Gill, Edwin Maurice	Laurinburg.
Grady, Roland Augusta	Wake Forest.
Hall, William Gentry	Ravensford.
Hampton, George Coggins, Jr.	Chapel Hill.
Hannah, William Tucker	Waynesville.
Hatch, James Jackson	Goldsboro.
Henderson, Garland Lee	Graham.
Hiatt, David LaFayette	Mount Airy.
High, Exavior Brooks	Red Oak.
Hill, Franklin Stanhope	Murphy.
Howerton, William Banks	Chapel Hill.
James, Murray Gibson	West Raleigh.
Johnson, Harvey Williams	Charlotte.
Johnson, Henry Lee	Burgaw.
Jones, Basil Thomas	Maysville.
Kennedy, Horace Greely	Shelby.
Kitchin, Mark Reed	Biltmore.
Lavender, John Lee	Old Fort.
Lefler, Wade Hampton	Cooleemee.
Lentz, DeVere Craven	St. Pauls.
Lewis, Julian Douglas	Whiteville.
Lowry, Robert Brooklyn	Elizabeth City.
McCormick, Hosea Valentine	Raeford.
Martin, Hunter Evander	Fayetteville.
Matthews, Walter Jerome, Jr.	Goldsboro.

MEEKINS, WILLIAM CHARLES ..... Elizabeth City.
MILLER, ROBERT CASSIUS ..... Asheville.
MURPHY, URAL RICHARD ..... Crouse.
OLIVER, WILLIAM BRINKLEY ..... Varina.
PERDUE, WILLIAM CLYDE ..... Henderson.
PHIPPS, LUTHER JAMES ..... Chapel Hill.
POWELL, HENRY EMMETT ..... Clinton.
PRINCE, WILLIAM MARSHALL ..... Laurinburg.
REESE, OWEN ..... Garysburg.
ROGERS, FOSTER CLYDE ..... Marion, S. C.
ROWLAND, WILLIAM IRVIN ..... Willow Springs.
SAMPLE, JOHN HARRIS ..... Hendersonville.
SAWYER, BONNER DUPREE ..... Grantsboro.
SAWYER, JERRY ..... Columbia.
SCARBOROUGH, ALBERT MOSES ..... Kinston.
SHARP, JAMES WILSON ..... Statesville.
SNOW, GEORGE KEY ..... Mt. Airy.
STEVENS, ELLIOTT WALKER ..... Warsaw.
SYLVESTER, RICHARD DURWARD ..... Richlands.
SYMMES, CLEVE MONTGOMERY ..... Wilmington.
TAYLOR, ROMIE EVERETT ..... Creswell.
TOWE, WILLIAM THOMPSON ..... Warrenton.
WARLICK, JOHN DREW ..... Jacksonville.
WHITAKER, EDGAR SUMMERFIELD ..... Laurinburg.
WOODLEY, SAMUEL SPRUILL ..... Creswell.

The following were admitted under the recent Comity Act:

MULDROW, CHARLES WESLEY ..... Florence, S. C.
O'NEAL, ALAN SMITH ..... Savannah, Ga.
WHITING, ROSCOE EVERETT ..... Florence, S. C.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1924

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1924
First District	August 26
Second District	September 2
Third and Fourth Districts	September 9
Fifth District	September 16
Sixth District	September 23
Seventh District	September 30
Eighth and Ninth Districts	October 7
Tenth District	October 14
Eleventh District	October 21
Twelfth District	October 28
Thirteenth District	November 4
Fourteenth District	November 11
Fifteenth and Sixteenth Districts	November 18
Seventeenth and Eighteenth Districts	November 25
Nineteenth District	December 2
Twentieth District	December 9

SUPERIOR COURTS, FALL TERM, 1924

The parenthesis numerals following the date of a term indicate the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Sinclair.*

Camden—Sept. 22.
Beaufort—July 21*; Sept. 29† (2); Nov. 17; Dec. 15†.
Gates—July 28; Dec. 8.
Tyrrell—Aug. 25†; Nov. 24.
Currituck—Sept. 1.
Chowan—Sept. 8; Dec. 1.
Pasquotank—Aug. 18*; Sept. 15†; Nov. 3 (2).
Hyde—Oct. 13.
Dare—Oct. 20.
Perquimans—Oct. 27.

SECOND JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Devin.*

Washington—July 7; Oct. 20.
Nash—Sept. 15*; Sept. 22†; Oct. 6†; Nov. 24*; Dec. 1†.
Wilson—Sept. 1; Sept. 29†; Oct. 27† (2); Dec. 15.
Edgecombe—Sept. 8; Oct. 13; Nov. 10† (2).
Martin—Dec. 8.

THIRD JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Bond.*

Northampton—Aug. 4‡; Oct. 27 (2).
Hertford—July 28; Oct. 13 (2).
Halifax—Aug. 11 (2); Nov. 24 (2).
Bertie—Aug. 25 (2); Sept. 8†; Nov. 10 (2).
Warren—Sept. 15 (2).
Vance—Sept. 29 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Barnhill.*

Lee—July 14 (2); Sept. 15†; Oct. 27; Nov. 3†.
Chatham—July 28 (2); Oct. 20.
Johnston—Aug. 11*; Sept. 22† (2); Dec. 8 (2).
Wayne—Aug. 18 (2); Oct. 6† (2); Nov. 24 (2).
Harnett—Sept. 1; Sept. 8†; Nov. 10† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Midyette.*

Pitt—Aug. 18†; Aug. 25; Sept. 8†; Sept. 22†; Oct. 20†; Oct. 27.
Craven—Sept. 1*; Sept. 29† (2); Nov. 17† (2).
Carteret—Oct. 13; Dec. 1.
Pamlico—Nov. 3 (2).
Jones—Sept. 15.
Greene—Dec. 8 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Daniels.*

Onslow—July 14†; Oct. 6; Nov. 17† (2).
Duplin—July 7*; Aug. 25† (2); Sept. 29*; Dec. 1 (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 20 (2).
Lenoir—Aug. 18*; Oct. 13; Nov. 3† (2).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Horton.*

Wake—July 7*; Sept. 8*; Sept. 15† (2); Sept. 29†; Oct. 6*; Oct. 20† (2); Nov. 3*; Nov. 24† (2); Dec. 8*.
Franklin—Aug. 25† (2); Oct. 13*; Nov. 10† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Grady.*

New Hanover—July 21*; Sept. 8*; Sept. 15†; Oct. 13† (2); Nov. 10*; Dec. 1† (2).
Pender—Sept. 22; Oct. 27† (2).
Columbus—Aug. 18 (2); Nov. 17† (2).
Brunswick—Sept. 1†; Sept. 29.

NINTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Calvert.*

Robeson—July 7* (2); Sept. 1† (2); Sept. 29† (2); Nov. 3*; Dec. 1† (2).
Bladen—Aug. 4*; Oct. 13†.
Hoke—Aug. 11 (2); Nov. 10.
Cumberland—Aug. 25*; Sept. 15† (2); Oct. 20† (2); Nov. 17*.

TENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Cranmer.*

Alamance—Aug. 11*; Sept. 1† (2); Nov. 24*.
Durham—Sept. 15† (2); Oct. 6*; Oct. 27† (2); Dec. 1*.
Granville—July 21; Oct. 20†; Nov. 10 (2).
Orange—Aug. 25; Sept. 29†; Dec. 8.
Person—Aug. 4; Oct. 13.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge McElroy.*

Ashe—July 7† (2); Oct. 13*.
Forsyth—July 21* (2); Sept. 8† (2); Sept. 29 (2); Nov. 3† (2); Dec. 1† (A); Dec. 8*.
Rockingham—Aug. 4* (2); Nov. 17† (2).
Caswell—Aug. 18; Dec. 1.
Alleghany—Sept. 22.
Surry—Aug. 25 (2); Oct. 20 (2).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Bryson.*

Davidson—July 14† (2); Aug. 18*; Sept. 8†; Nov. 17 (2).
Guilford—July 28*; Aug. 4† (2); Aug. 25† (2); Sept. 15* (2); Sept. 29† (2); Oct. 27† (2); Nov. 10*; Dec. 1† (2); Dec. 15*.
Stokes—July 7†; Oct. 13*; Oct. 20†.

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Lane.*

Stanly—July 7; Oct. 6†; Nov. 17.
Richmond—July 14†; July 21*; Sept. 1†; Sept. 29*; Nov. 3†.
Union—July 28*; Aug. 18† (2); Oct 13; Oct. 20†.
Anson—Sept. 8*; Sept. 22†; Nov. 10†.
Moore—Aug. 11*; Sept. 15†; Dec. 8†.
Scotland—Oct. 27†; Nov. 24 (2).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Shaw.*

Mecklenburg—July 7* (2); Aug. 25*; Sept. 1† (2); Sept. 29*; Oct. 6† (2); Oct. 27† (2); Nov. 10*; Nov. 17† (2).
Gaston—Aug. 11†; Aug. 18*; Sept. 15† (2); Oct. 20*; Dec. 1† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Stack.*

Montgomery—July 7; Sept. 22†; Sept. 29.
Randolph—July 14† (2); Sept. 1*; Dec. 1 (2).
Iredell—July 28 (2); Nov. 3 (2).
Cabarrus—Aug. 11 (3); Oct. 13 (2).
Rowan—Sept. 8 (2); Oct. 6†; Nov. 17 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Harding.*

Catawba—June 30 (2); Sept. 1† (2); Nov. 10*.
Lincoln—July 14; Oct. 13; Oct. 20†.
Cleveland—July 21 (2); Oct. 27 (2).
Burke—Aug. 4 (2); Sept. 29† (2); Dec. 8; Dec. 15†.
Caldwell—Aug. 18 (2); Nov. 24 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Long.*

Alexander—Sept. 15 (2).
Yadkin—Aug. 18; Nov. 24.
Wilkes—Aug. 4 (2); Sept. 29† (2).
Davie—Aug. 25; Dec. 1†.
Watauga—Sept. 1 (2).
Mitchell—July 21 (2); Nov. 10 (2).
Avery—June 30† (3); Oct. 13 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Webb.*

Transylvania—July 21 (2); Nov. 24 (3).
Henderson—Sept. 29 (2); Nov. 10† (2).
Rutherford—Aug. 18† (2); Oct. 27 (2).
McDowell—July 7 (2); Sept. 15 (2).
Yancey—Aug. 4† (2); Oct. 13 (2).
Polk—Sept. 1 (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Finley.*

Buncombe—July 14† (2); July 28†; Aug. 4† (2); Aug. 18; Sept. 1† (2); Sept. 15; Oct. 6† (2); Oct. 20; Nov. 3† (2); Nov. 17; Dec. 1† (2); Dec. 15.
Madison—Aug. 25; Sept. 22; Oct. 27; Nov. 24.

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1924—*Judge Ray.*

Haywood—July 7 (2); Sept. 15 (2); Nov. 24 (2).
Cherokee—Aug. 4 (2); Nov. 3 (2).
Jackson—Oct. 6 (2).
Swain—July 21 (2); Oct. 20 (2).
Graham—Sept. 1 (2).
Clay—Sept. 29.
Macon—Aug. 18 (2); Nov. 17.

* For criminal cases only.
† For civil cases only.
‡ For jail and civil cases.
(A) Emergency Judge assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. ALBERT T. WILLIS, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. H. K. NASH, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September. S. A. ASHE, Clerk, Raleigh.

Wilson, first Monday in April and October. S. A. ASHE, Clerk, Raleigh.

OFFICERS

IRVIN B. TUCKER, United States District Attorney, Whiteville.
J. D. PARKER, Assistant United States District Attorney, Smithfield.
WILLIS G. BRIGGS, Assistant United States District Attorney, Raleigh.
R. W. WARD, United States Marshal, Raleigh.
S. A. ASHE, Clerk United States District Court, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December. R. L. BLAYLOCK, Clerk; MYRTLE DWIGGINS, Chief Deputy; DELLA BUTT, Deputy.

Statesville, third Monday in April and October. J. B. GILL, Deputy Clerk.

Asheville, first Monday in May and November. J. Y. JORDAN and O. L. MCLURD, Deputy Clerks.

Charlotte, first Monday in April and October. E. S. WILLIAMS, Deputy Clerk.

Wilkesboro, fourth Monday in May and November. MILTON MCNEILL, Deputy Clerk.

Salisbury, fourth Monday in April and October. J. B. GILL, Deputy Clerk, Statesville.

OFFICERS

FRANK A. LINNEY, United States District Attorney, Charlotte.
CHAS. A. JONAS, Assistant United States Attorney, Lincolnton.
THOS. J. HARKINS, Assistant United States Attorney, Asheville.
BROWNLOW JACKSON, United States Marshal, Asheville.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

CASES REPORTED

A

	PAGE
Adams v. Bank	343
Adams, Parham v.	856
Allen v. Garibaldi	798
Allen v. Parker	376
Anderson v. Express Co.	171
Anderson v. Nichols	808
Andrews, Killian v.	810
Armfield, Leak v.	625
Arrowood, S. v.	715
Ashburn, S. v.	717
Assurance Co., Land Bank v.	851
Assurance Society, Powell v.	596
Austin v. R. R.	7
Auto Co. v. McCandless	865
Automotive Assn. v. Cochran	25

B

Bagwell v. Hines	690
Bailey, Kidder v.	505
Baker, *In re*	257
Baldwin, S. v.	865
Bank, Adams v.	343
Bank v. Canaday	493
Bank v. Cotton Co.	65
Bank v. Crotts	865
Bank, Curlee v.	119
Bank v. Duke	386
Bank v. Heath	54
Bank v. Ins. Co.	97
Bank v. Knox	565
Bank v. Leverette	743
Bank, Little v.	1
Bank v. Sumner	762
Bank v. Watson	107
Bank v. Wells	515
Barbee v. Barbee	538
Barbee v. Davis	78
Barbee, S. v.	703
Barrett, S. v.	865
Battle v. Mercer	437
Battle, Tobacco Growers Assn. v.	260
Beam v. R. R.	854
Bell v. Danzer	224
Bickley v. Green	772
Bissett, Tobacco Growers Assn. v.	180
Bivens v. Board of Education	769
Blair v. Comrs. of New Hanover	488
Bland, Tobacco Growers Assn. v.	356
Blue v. Gardner	865
Blue v. Trustees	431
Blum v. R. R.	640
Board of Education, Bivens v.	769
Board of Education, *In re*	710
Board of Education, Jones v.	557
Board of Education, McInnish v.	494
Bridger v. Mitchell	374
Brock, Fertilizer Co. v.	169
Brockenbrough, Const. Co. v.	65
Brooks, S. v.	857
Brooks v. White	656
Brown, Harvey v.	362
Building Co., Dellinger v.	845
Butner, Walker v.	535
Byrd v. Davis	575

C

Cahoon v. Everton	369
Campbell v. Hall	464
Canaday, Bank v.	493
Carraway, Jinkins v.	405
Case, Porter v.	629
Chadwick-Hoskins Co., Van Dyke v.	695
Chemical Co. v. Walston	817
Cherry v. Hodges	368
Citizens Co. v. Typographical Union	42
Clark v. Harris	251
Clay, Thomas v.	778
Clegg v. Clegg	730
Clinard, Shelton v.	664
Cloninger, Gastonia v.	765
Cobb v. Fountain	335
Cochran, Automotive Assn. v.	25
Collins v. R. R.	141
Comrs. of Edgecombe v. Prudden	794
Comrs. of Gates, Sparkman v.	241
Comrs. of Haywood, Plott v.	125
Comrs. of New Hanover, Blair v.	488
Conner, Draper v.	18
Connor v. Lumber Co.	863
Const. Co. v. Brockenbrough	65
Continental Guaranty Corp. v. Powell	865
Cooper, Tonkins v.	570
Corbett v. Hawes	653
Corbett v. Payne	161
Corbitt, Hunsucker v.	496

	PAGE
Cornell, Miller v.	550
Corp. Com. *ex rel.* Granite Co. v. R. R.	424
Coston, *In re*	509
Cotton Co., Bank v.	65
Cotton Mills, Dillon v.	812
Cotton Mills Co., Finance Co. v.	233
Covington, Page v.	621
Cox, Fertilizer Works v.	654
Crafts, R. R. v.	561
Crotts, Bank v.	865
Crutchfield, S. v.	607
Curlee v. Bank	119
Current, Teague v.	483

D

Danzer, Bell v.	224
Davis, Barbee v.	78
Davis, Byrd v.	575
Davis, Leonard v.	471
Davis v. R. R.	147
Deans, Forbes v.	164
Dellinger v. Building Co.	845
Deposit Co. v. Trust Co.	611
Dillon v. Cotton Mills	812
Dison, S. v.	854
Doughton, Trust Co. v.	263
Draper v. Conner	18
Duke, Bank v.	386
Dunn v. Taylor	385
Dunn v. Taylor	865

E

Early v. Flour Mills	344
Edwards, S. v.	259
Ellis, *In re*	840
Elkins, S. v.	533
Emory v. Gas Boat	167
Epstein, Rosenthal v.	865
Erskine v. Motor Co.	826
Everett v. Williams	853
Everton, Cahoon v.	369
Express Co., Anderson v.	171

F

Fagan v. Fagan	865
Felder, Pruitt v.	865
Fertilizer Co. v. Brock	169
Fertilizer Works v. Cox	654
Finance Co. v. Cotton Mills Co.	233
Fleming v. Motz	593
Flour Mills, Early v.	344
Forbes v. Deans	164
Fountain, Cobb v.	335
Fuel Co. v. Monroe	703

G

Gardner, Blue v.	865
Garibaldi, Allen v.	798
Garner v. Quakenbush	603
Garrison v. McGimpsey	700
Gas Boat, Emory v.	167
Gastonia v. Cloninger	765
Gavin, Ins. Co. v.	14
Gentry v. Gentry	29
Gerock, Hammond v.	855
Gillam v. Windsor	852
Gillespie v. Gillespie	40
Gladstone v. Swaim	712
Gover v. Malever	774
Grant v. Power Co.	862
Grantham v. Nunn	394
Gravely, Starkweather v.	526
Green, Bickley v.	772
Green v. Harshaw	213
Green, Hayes v.	776
Greene v. Lyles	422
Greene v. Lyles	598
Green, S. v.	466
Griffin, Matthews v.	599
Guano Co. v. Walston	667

H

Hackett v. Townsend	865
Hall, Campbell v.	464
Halyburton, Warner v.	414
Hammond v. Gerock	855
Hardee, *In re*	381
Harris, Clark v.	251
Harris v. Slater	163
Harshaw, Green v.	213
Harvey v. Brown	362
Hawes, Corbett v.	653
Hayes v. Green	776
Hayes, S. v.	490
Heath, Bank v.	54
Hedden, S. v.	803
Hendricks, S. v.	327
Herring v. Ipock	459
Herring, Shearer v.	855
Hightower, S. v.	300
Highway Com., Marshall v.	858
Hill v. Patillo	531
Hines, Bagwell v.	690
Hinnant v. Power Co.	288

	PAGE
Hodges, Cherry v.	368
Holland, Livestock Co. v.	346
Horner v. Ins. Co.	857
Hospital v. Mills	859
Hotel Co. v. Latta	859
Hunsucker v. Corbitt	496
Hunt, Oil Co. v.	157
Hutton, Morganton v.	736
Hyatt v. Hyatt	113

I

Indemnity Co. v. Tanning Co.	190
In re Baker	257
In re Board of Education	710
In re Coston	509
In re Ellis	840
In re Hardee	381
In re Little	177
In re Ryan	569
In re Ware	693
In re Will of Willett	865
Institute, McCall v.	757
Ins. Co., Bank v.	97
Ins. Co. v. Gavin	14
Ins. Co., Horner v.	857
Ipock, Herring v.	459

J

Jenkins v. Lumber Co.	864
Jennette v. Mann	851
Jinkins v. Carraway	405
Johnson v. Lee	753
Johnson v. Murphy	384
Johnson v. Murphy	852
Jones v. Board of Education	557
Jones v. Jones	589

K

Kidder v. Bailey	505
Killian v. Andrews	810
Kilpatrick v. Kilpatrick	520
Kinsaul, Worthington v.	865
Knox, Bank v.	565

L

Lacy, R. R. v.	615
Land Bank v. Assurance Co.	851
Latta, Hotel Co. v.	859
Lawing, Reidsville v.	865
Leak v. Armfield	625
Lee, Johnson v.	753
Lee, Taylor v.	393
Leonard v. Davis	471
Lerch v. McKinne	419
Leverette, Bank v.	743
Levy, S. v.	581
Lewis, Martin v.	473
Lewis, Montgomery v.	577
Lineberry v. R. R.	786
Little v. Bank	1
Little, *In re*	177
Livestock Co. v. Holland	346
Long v. Rockingham	199
Love, S. v.	32
Lovelace v. Pratt	686
Lowe, S. v.	524
Lumber Co., Connor v.	863
Lumber Co., Jenkins v.	864
Lumber Co. v. Lumber Co.	417
Lumber Co., Matthews v.	651
Lumber Co., Moody v.	861
Lumber Co., Owen v.	861
Lyles, Greene v.	422
Lyles, Greene v.	598

M

McAllister v. Pryor	832
McAllister, S. v.	400
McCall v. Institute	757
McCandless, Auto. Co. v.	865
McCarter v. R. R.	863
McCoy, S. v.	865
McGimpsey, Garrison v.	700
McInnish v. Board of Education	494
McKinne, Lerch v.	419
McRae, Mills v.	707
Malever, Gover v.	774
Mangum, S. v.	477
Mann, Jennette v.	851
Marble Co., Palmer v.	865
Marriner, Miller v.	449
Marshall v. Highway Com.	858
Martin v. Lewis	473
Matthews v. Griffin	599
Matthews v. Lumber Co.	651
Melton, S. v.	481
Mercer, Battle v.	437
Miller v. Cornell	550
Miller v. Marriner	449
Mills, Hospital v.	859
Mills v. McRae	707
Mitchell, Bridger v.	374
Monroe, Fuel Co. v.	703
Monroe, R. R. v.	702
Monroe, Shute v.	676

	PAGE
Montgomery v. Lewis	577
Moody v. Lumber Co	861
Moore, Royal v.	379
Morganton v. Hutton	736
Morganton, Smith v.	801
Moss, Tobacco Growers Assn. v.	421
Motor Co., Erskine v.	826
Motz, Fleming v.	593
Murphy, Johnson v.	384
Murphy, Johnson v.	852

N

New Bern, Turner v.	541
Nichols, Anderson v.	808
Nichols, R. R. v.	153
Nunn, Grantham v.	394

O

Oil Co. v. Hunt	157
Oil Co., Shelton v.	865
O'Neal, S. v.	22
Owen v. Lumber Co	861
Oxendine, S. v.	658

P

Page v. Covington	621
Palmer v. Marble Co	865
Parham v. Adams	856
Park Co., Stikeleather v.	860
Parker, Allen v.	376
Patillo, Hill v.	531
Patterson, Tob. Growers Assn. v.	252
Payne, Corbett v.	161
Pender v. Taylor	250
Pittman v. Tob. Growers Assn.	340
Plott v. Comrs. of Haywood	125
Pollock, Tob. Growers Assn. v.	409
Poole, Ray v.	749
Pope, Thompson Co. v.	865
Porter v. Case	629
Powell v. Assurance Society	596
Powell, Continental Guaranty Corp. v.	865
Powell v. Williamson	865
Power Co., Grant v.	862
Power Co., Hinnant v.	288
Pratt, Lovelace v.	686
Prudden, Comrs. of Edgecombe v.	794
Pruitt v. Felder	865
Pryor, McAllister v.	832
Pyles v. Pyles	486

Q

	PAGE
Quakenbush, Garner v.	603

R

R. R., Austin v.	7
R. R., Beam v.	854
R. R., Blum v.	640
R. R., Collins v.	141
R. R., Corp. Com. *ex rel.* Granite Co. v.	424
R. R. v. Crafts	561
R. R., Davis v.	147
R. R. v. Lacy	615
R. R., Lineberry v.	786
R. R., McCarter v.	863
R. R. v. Monroe	702
R. R. v. Nichols	153
R. R. v. Reid	320
R. R., Stevens v.	528
R. R. v. Story	184
R. R., Strunks v.	175
R. R., Weedon v.	701
R. R., Williams v.	348
Rand, Whitt v.	805
Ray v. Poole	749
Reid, R. R. v.	320
Reidsville v. Lawing	865
Rhodes v. Shelton	716
Rockingham, Long v.	199
Rosenthal v. Epstein	865
Royal v. Moore	379
Ryan, *In re*	569

S

Shearer v. Herring	855
Shelton v. Clinard	664
Shelton v. Oil Co	865
Shelton, Rhodes v.	716
Shepherd, S. v.	609
Shute v. Monroe	676
Sikes Co., Whitaker v.	613
Slater, Harris v.	163
Smith v. Morganton	801
Smith, S. v.	469
Snowden v. Snowden	539
Sparkman v. Comrs. of Gates	241
Speight, Winslow v.	248
Spikes, Tob. Growers Assn. v.	367
Starkweather v. Gravely	526
S. v. Arrowood	715
S. v. Ashburn	717
S. v. Baldwin	865
S. v. Barbee	703

	PAGE
S. v. Barrett	865
S. v. Brooks	857
S. v. Crutchfield	607
S. v. Dison	854
S. v. Edwards	259
S. v. Elkins	533
S. v. Green	466
S. v. Hayes	490
S. v. Hedden	803
S. v. Hendricks	327
S. v. Hightower	300
S. v. Levy	581
S. v. Love	32
S. v. Lowe	524
S. v. McAllister	400
S. v. McCoy	865
S. v. Mangum	477
S. v. Melton	481
S. v. O'Neal	22
S. v. Oxendine	658
S. v. Shepherd	609
S. v. Smith	469
S. v. Switzer	88
S. v. Valley	571
S. v. Wilkerson	865
S. v. Williams	492
S. v. Young	698
Stevens v. R. R.	528
Stikeleather v. Park Co.	860
Story, R. R. v.	184
Strunks v. R. R.	175
Sumner, Bank v.	762
Swaim, Gladstone v.	712
Switzer, S. v.	88

T

Tanning Co., Indemnity Co. v.	190
Taylor, Dunn v.	385
Taylor, Dunn v.	865
Taylor v. Lee	393
Taylor, Pender v.	250
Teague v. Current	483
Thayer v. Thayer	573
Thomas v. Clay	778
Thompson Co. v. Pope	865
Times Co. v. Typographical Union	157
Tobacco Growers Assn. v. Battle	260
Tobacco Growers Assn. v. Bissett	180
Tobacco Growers Assn. v. Bland	356
Tobacco Growers Assn. v. Moss	421
Tobacco Growers Assn. v. Patterson	252
Tobacco Growers Assn., Pittman v.	340
Tobacco Growers Assn. v. Pollock	409
Tobacco Growers Assn. v. Spikes	367
Tonkins v. Cooper	570
Townsend, Hackett v.	865
Trust Co., Deposit Co. v.	611
Trust Co. v. Doughton	263
Trustees, Blue v.	431
Turner v. New Bern	541
Typographical Union, Citizens Co. v.	42
Typographical Union, Times Co. v.	157

V

Valley, S. v.	571
Van Dyke v. Chadwick-Hoskins Co.	695

W

Walker v. Butner	535
Walston, Chemical Co. v.	817
Walston, Guano Co. v.	667
Ware, *In re*	693
Warner v. Halyburton	414
Watson, Bank v.	107
Weedon v. R. R.	701
Wells, Bank v.	515
Wells v. Williams	134
Whitaker v. Sikes Co.	613
White, Brooks v.	656
Whitt v. Rand	805
Williams, Everett v.	853
Williams v. R. R.	348
Williams, S. v.	492
Williams, Wells v.	134
Williamson, Powell v.	865
Willett, *In re* Will of	865
Wilkerson, S. v.	865
Windsor, Gillam v.	852
Winslow v. Speight	248
Worthington v. Kinsaul	865

Y

Young, S. v.	698

CASES CITED

A

Aaron, Jeffries v. ....120 N. C., 167.... 9, 605, 606, 658
Abee, *In re*....146 N. C., 373.... 5
Abernathy, Manly v....167 N. C., 220.... 672
Achenbach, Boyden v.... 79 N. C., 539.... 21
Adams, Perry v.... 98 N. C., 167.... 398
Adams v. R. R....125 N. C., 565.... 556
Adams v. R. R....110 N. C., 326.... 803
Adams, S. v....138 N. C., 691, 696.... 700
Adcock, Hargrove v. ....111 N. C., 171.... 761
Adderton, Everhardt v. ....175 N. C., 403, 406.... 32
Aden v. Doub....146 N. C., 10.... 16
Adv. Co. v. Warehouse Co....186 N. C., 197.... 709
Ainsley v. Lumber Co....165 N. C., 122.... 848
Albertson v. Terry....108 N. C., 75.... 390
Aldridge, Clarke v. ....162 N. C., 326.... 746
Aldridge, Robertson v. ....185 N. C., 292.... 799
Alexander, Carr v. ....169 N. C., 665.... 832
Alexander v. Gibbon....118 N. C., 796.... 31
Alexander, Penniman v. ....111 N. C., 427.... 16
Alford v. McCormac.... 90 N. C., 153.... 371
Allen, Brittain v. .... 13 N. C., 120.... 586
Allen v. Cameron....181 N. C., 120.... 507
Allen v. Grissom.... 90 N. C., 90.... 821
Allen, Johnson v. ....100 N. C., 137.... 418
Allen v. Pearce.... 59 N. C., 309.... 255
Allen v. R. R....120 N. C., 550.... 82
Allen v. Saunders....186 N. C., 349.... 823
Allen, S. v. .... 8 N. C., 9.... 305
Allen, S. v. ....107 N. C., 805.... 23
Alley, S. v. ....180 N. C., 663.... 716
Allison, Gillespie v. ....115 N. C., 542.... 753
Alpha Mills v. Engine Co....116 N. C., 802.... 503
Aluminum Co., Foundry Co. v...172 N. C., 704, 706.... 466
Anderson v. Corporation....155 N. C., 132, 135....223, 809
Anderson, *In re*....132 N. C., 244.... 747
Anderson v. Wilkins....142 N. C., 157.... 74
Andrews v. Grimes....148 N. C., 437.... 462
Andrews, Mfg. Co. v....165 N. C., 285, 294....415, 466, 634
Andrews, Street v. ....115 N. C., 417, 422.... 155
Ange, Church v. ....161 N. C., 314.... 625
Anthony v. Jeffress....172 N. C., 381.... 518
Archbell, Mann v. ....186 N. C., 74.... 832
Archbell, S. v. ....139 N. C., 537.... 470
Armfield, S. v. .... 27 N. C., 207.... 663
Armstrong, Porter v. ....132 N. C., 66.... 132
Armstrong, Porter v. ....134 N. C., 447.... 496
Arrowood v. R. R....126 N. C., 632.... 700
Arthur, Wolf v. ....112 N. C., 692.... 366
Artis, Hall v. ....186 N. C., 105.... 747

Asheboro, Snyder v. ....182 N. C., 710.... 85, 722
Asheville, Justice v. ....161 N. C., 62.... 769
Askew v. Askew....103 N. C., 285.... 824
Askew, Moore v. .... 85 N. C., 199.... 338
Assurance Society, Schas v....170 N. C., 421.... 85
Atkinson v. Downing....175 N. C., 244.... 515
Austin v. Austin....160 N. C., 367.... 507
Austin, Cuthbertson v. ....152 N. C., 336.... 850
Austin, Everett v. ....169 N. C., 622.... 376
Austin v. Stewart....126 N. C., 525.... 211
Avery v. Stewart....136 N. C., 426.... 579
Aycock v. R. R.... 89 N. C., 321.... 186
Aydlett v. R. R....172 N. C., 47, 49.... 143, 172, 174

B

Baber v. Hanie....163 N. C., 588.... 112
Baggett v. Jackson....160 N. C., 26.... 747
Baggett v. Lanier ....178 N. C., 129.... 156
Bagley, St. James v....138 N. C., 384.... 625
Bagwell v. R. R....167 N. C., 611.... 353, 355
Bailey v. Bailey....172 N. C., 671, 674 594
Bailey, Councill v. ....154 N. C., 54.... 219
Bailey v. Hassell....184 N. C., 451.... 494
Bailey v. Hopkins....152 N. C., 748.... 209
Bailey, S. v. ....100 N. C., 528.... 25
Bailey, Williams v. ....178 N. C., 632.... 509
Bailey v. Wilson.... 21 N. C., 182, 187 255
Baird, Jackson v. ....148 N. C., 29.... 31
Baird, Lee v. ....146 N. C., 361.... 472
Baker, Exum v. ....115 N. C., 242.... 745, 746
Baker, Gay v. .... 58 N. C., 344.... 540
Baker, McMillan v. .... 85 N. C., 291.... 447, 448
Baker, McMillan v. .... 92 N. C., 110.... 447, 448
Baker v. R. R....144 N. C., 37, 43.... 352, 355, 556
Baker v. Winslow....184 N. C., 9.... 418
Baldwin, Roberts v. ....155 N. C., 276.... 832
Baldwin, S. v. .... 80 N. C., 390.... 586
Baldwin, S. v. ....152 N. C., 822.... 470
Baldwin, S. v. ....184 N. C., 791.... 729
Ball v. McCormack....172 N. C., 682.... 39
Ballard, Comrs. of Granville v... 69 N. C., 18.... 134
Bank v. Bank....158 N. C., 239, 244, 251.... 398, 399
Bank v. Burgwyn ....110 N. C., 267, 273....518, 519
Bank, Cole v. ....186 N. C., 514.... 785
Bank, Corp. Com. v. ....164 N. C., 358.... 518
Bank v. Drug Co....152 N. C., 142.... 777
Bank v. Exum....163 N. C., 202.... 237
Bank, Grady v. ....184 N. C., 162.... 518
Bank, Granite Co. v....172 N. C., 354.... 466
Bank v. Harris.... 96 N. C., 118.... 522
Bank v. Hatcher....151 N. C., 359.... 613
Bank v. Justice....157 N. C., 375.... 527
Bank, Lacy v. ....183 N. C., 373.... 689
Bank v. McEwen....160 N. C., 416.... 476

Bank v. Mfg. Co.....186 N. C., 744..... 240
Bank, Miller v. .....176 N. C., 152..... 864
Bank v. Oil Mills.....150 N. C., 683..... 586
Bank v. Sauls.....183 N. C., 165, 169 673
Bank v. Yelverton.....185 N. C., 318..... 197
Barbee v. Penny.....174 N. C., 571..... 251
Barber, Publishing Co. v.....165 N. C., 478, 486 398
Barber, S. v. .....113 N. C., 711..... 586
Barefoot v. Lee.....168 N. C., 90..... 39
Barefoot v. Musselwhite.....153 N. C., 208..... 210
Barefoot, S. v. ..... 89 N. C., 565..... 663
Barger v. Barringer.....151 N. C., 433..... 231
Barnes, Barrett v. .....186 N. C., 154..... 112
Barnes, Howell v. ..... 64 N. C., 625..... 420
Barnhardt v. Smith..... 86 N. C., 479..... 848
Barnhill, S. v. .....186 N. C., 446, 450..... 468, 723, 729
Barrett v. Barnes.....186 N. C., 154..... 112
Barringer, Barger v. .....151 N. C., 433..... 231
Barringer, S. v. .....110 N. C., 525, 529 325
Baruch, Summerrow v. .....128 N. C., 202..... 503
Baskerville, Plummer v. ..... 36 N. C., 252..... 579
Basnight, Nowell v. .....185 N. C., 148..... 293
Bass, Murray v. .....184 N. C., 318..... 605
Batchelor v. Macon..... 69 N. C., 545..... 424
Bateman v. Hopkins.....157 N. C., 470..... 221
Battle v. Battle.....116 N. C., 161..... 522, 523
Batts, Farmer v. ..... 83 N. C., 387..... 221
Batts v. Sullivan.....182 N. C., 129..... 274
Baynes v. Harris.....160 N. C., 307..... 578
Bazemore v. Bridgers.....105 N. C., 191..... 155
Beach v. R. R.....148 N. C., 153..... 148
Beatty, Heyer v. ..... 76 N. C., 28..... 666
Beck v. Wilkins-Ricks Co.....186 N. C., 213..... 503
Becton, Eubanks v. .....158 N. C., 233..... 454
Belk v. Belk.....175 N. C., 69..... 850
Bell, Hargett v. .....134 N. C., 395..... 548
Belo v. Comrs. of Forsyth..... 82 N. C., 415..... 281, 283
Belshe v. R. R.....186 N. C., 246..... 300
Benbow, Trust Co. v.....135 N. C., 303, 312.....335, 825
Benbury v. Butts.....184 N. C., 24..... 540
Benedict v. Jones.....129 N. C., 470, 473.....579, 614
Benefit Society, Morgan v.....167 N. C., 266..... 503
Bennett, Cameron v. .....110 N. C., 277..... 251
Bennett, Harris v. .....160 N. C., 347..... 606
Benson, S. v. .....183 N. C., 795..... 470
Benton v. Collins.....125 N. C., 94..... 651
Benton, S. v. .....19 N. C., 196, 212.....584, 585
Bernhardt v. Brown.....118 N. C., 701, 705 376
Bethea, S. v. .....186 N. C., 22..... 849
Biggers v. Matthews.....147 N. C., 300..... 231
Biggs v. Ins. Co..... 88 N. C., 141..... 102
Black v. Black.....110 N. C., 399..... 197
Black v. Ins. Co.....148 N. C., 169..... 102
Black v. Lindsay..... 44 N. C., 467..... 448
Black, S. v. .....121 N. C., 578..... 24

Blackwell v. Blackwell....124 N. C., 269....692, 756
Blackwell, McElwee v. .... 82 N. C., 345.... 832
Blackwell, S. v. ....162 N. C., 684.... 39
Blake v. Smith....163 N. C., 274.... 196
Blanchard v. Peanut Co....180 N. C., 23.... 658
Blankenship, Bowman v. ....165 N. C., 519.... 850
Blue v. Ritter....118 N. C., 580.... 507
Blue, Williams v. ....173 N. C., 453.... 354, 355
Bd. of Education v. Bray....184 N. C., 484.... 247, 436
Bd. Ed. v. Comrs. of Johnston..183 N. C., 300, 302.... 75, 77, 690
Bd. Ed. v. Comrs. of Yadkin....182 N. C., 571.... 712
Bd. of Education, Davenport v...183 N. C., 570.... 495
Board of Education, Davis v.....186 N. C., 233.... 131
Bd. of Education v. Makely.....139 N. C., 31, 38 656
Bd. of Education, Pickler v.....149 N. C., 221.... 413
Bd. Ed., School Committee v.....186 N. C., 643, 648 ....495, 643, 797
Bobbitt, Cheatham v. ....118 N. C., 343.... 463
Bobbitt v. Stanton....120 N. C., 253.... 112
Bohanon, S. v. ....142 N. C., 695.... 588, 847
Bond v. Cotton Mills....166 N. C., 20.... 232
Bond v. Mfg. Co....140 N. C., 381.... 116
Boney v. Boney....161 N. C., 621.... 588
Boney v. R. R....155 N. C., 95.... 85
Bonner v. Rodman.... 163 N. C., 2.... 628
Boone v. Lee....175 N. C., 383.... 41
Bost v. Bost.... 87 N. C., 477.... 116
Bowden, Exum v. .... 39 N. C., 281.... 337
Bowman v. Blankenship....165 N. C., 519.... 850
Bowser v. Tarry....156 N. C., 38.... 422
Box Factory v. R. R....148 N. C., 421.... 174
Boyd, Jones v. .... 80 N. C., 258.... 131
Boyd, S. v. ....175 N. C., 793.... 716
Boyden v. Achenbach.... 79 N. C., 539.... 21
Boyette, Kirby v. ....116 N. C., 167.... 815
Boynton, S. v. ....155 N. C., 457, 464 24
Brabham, S. v. ....108 N. C., 793.... 850
Brackville, S. v. ....106 N. C., 710.... 483
Bradley v. Mfg. Co....177 N. C., 155.... 39
Bragaw, Church v. ....144 N. C., 126.... 625
Bragg v. Lyon.... 93 N. C., 151.... 746
Bramham v. Durham....171 N. C., 198.... 490
Branch v. Walker.... 92 N. C., 87.... 386
Brandon, Plummer v. .... 40 N. C., 192.... 842
Braswell v. Pope.... 82 N. C., 57.... 16
Bray, Bd. of Education v.....184 N. C., 484.... 247, 436
Brewer v. Ring....177 N. C., 476.... 82
Brewington v. Hargrove....178 N. C., 146.... 365
Brewington v. Loughran....183 N. C., 558.... 358
Brickell v. Hines....179 N. C., 254.... 512
Bridgers, Bazemore v. ....105 N. C., 191.... 155
Bridgers, S. v....161 N. C., 247.... 267
Bridges v. Pleasant.... 39 N. C., 26.... 783
Bridges, S. v. ....178 N. C., 733.... 663
Brim, S. v. .... 57 N. C., 300.... 277
Brinkley, Cahoon v. ....168 N. C., 258.... 258

Brinkley, Cahoon v. ....176 N. C., 5.... 605
Brinkley, Craddock v. ....177 N. C., 124.... 391
Bristol v. R. R.....175 N. C., 510.... 82
Brite v. Penny.....157 N. C., 112, 114....518, 614
Brittain v. Allen..... 13 N. C., 120.... 586
Brittain v. Mull..... 91 N. C., 499.... 747
Brittain, Patton v. ..... 32 N. C., 8.... 527
Brittain, S. v. ..... 89 N. C., 481.... 586
Britton v. Miller..... 63 N. C., 270.... 378
Broadnax, S. v. ..... 91 N. C., 543.... 479
Brock v. Ins. Co.....156 N. C., 112.... 9
Brodnax v. Groom..... 64 N. C., 244.... 324
Brogden, S. v. .....111 N. C., 656.... 584
Brown, Bernhardt v. .....118 N. C., 701, 705 376
Brown v. Brown.....182 N. C., 42.... 531
Brown v. Chemical Co.....165 N. C., 421.... 155
Brown, Doyle v. ..... 72 N. C., 393.... 209
Brown v. Harding.....171 N. C., 686, 691 398
Brown v. Hillsboro.....185 N. C., 368.... 75
Brown, *In re*.....185 N. C., 399.... 747
Brown v. Jackson.....179 N. C., 363, 371 281
Brown, S. v. .....125 N. C., 704.... 479
Brown, Taylor v. .....165 N. C., 157.... 507
Bruce v. Mining Co.....147 N. C., 642.... 634
Bruce v. Nicholson.....109 N. C., 202.... 474
Bryan, Harrison v. .....148 N. C., 315.... 413
Bryan, Stewart v. .....121 N. C., 46.... 170
Bryson City, Eppley v.....157 N. C., 487.... 204
Bryson v. R. R.....141 N. C., 594.... 597
Buchanan v. Harrington.....152 N. C., 333.... 748
Buchanan, Riley v. ..... 60 N. C., 479.... 424
Buggy Corp. v. R. R.....152 N. C., 119, 122.....143, 172, 173, 174
Buhmann, Hardware Co. v.....159 N. C., 512.... 390
Buie v. Kennedy.....164 N. C., 299.... 222
Building Co., Mfg. Co. v.....177 N. C., 106.... 39
Building Co. v. Sanders.....185 N. C., 328.... 422
Bullard v. Hollingsworth.....140 N. C., 634.... 654
Bullock v. Oil Co.....165 N. C., 67.... 75
Bullock v. R. R.....105 N. C., 180.... 151, 152
Bunch v. Lumber Co.....174 N. C., 8.... 212
Bunting v. Jones..... 78 N. C., 242.... 825, 826
Burgwyn, Bank v. .....110 N. C., 267, 273.....518, 519
Burnett, S. v. .....142 N. C., 580.... 94
Burnett, S. v. .....179 N. C., 735.... 511, 514
Burney v. Comrs. of Bladen.....184 N. C., 277.... 75
Burns v. McFarland.....146 N. C., 382.... 131, 255
Burns v. R. R.....125 N. C., 306.... 651
Burn's Will, *In re*.....121 N. C., 336, 338.....116, 383
Burr v. Maultsby..... 99 N. C., 263.... 636
Burriss v. Starr.....165 N. C., 657.... 761
Burroughs, Pinnell v. .....172 N. C., 182.... 816
Burton, S. v. .....172 N. C., 942.... 39
Busbee v. Comrs. of Wake..... 93 N. C., 144.... 768
Busbee v. Lewis..... 85 N. C., 332.... 548
Bussell, Furniture Co. v.....171 N. C., 485.... 503

Butler v. Mfg. Co.....182 N. C., 547..... 25, 483
Butts, Benbury v. .....184 N. C., 24..... 540
Butts v. Screws..... 95 N. C., 215..... 776
Bynum, Spencer v. .....169 N. C., 119..... 810
Byers, Moore v. ..... 65 N. C., 240..... 825
Byers, S. v. .....100 N. C., 518..... 469
Byrd v. Express Co.....139 N. C., 273..... 241
Byrd v. Southerland.....186 N. C., 384..... 472
Byrd v. Spruce Co.....170 N. C., 435..... 125
Byrd, Wagon Co. v.....119 N. C., 460..... 746

C

Cab Co. v. Creasman.....185 N. C., 551..... 52, 262
Cahoon v. Brinkley.....168 N. C., 258..... 258
Cahoon v. Brinkley.....176 N. C., 5..... 605
Cain v. Comrs. of Davie..... 86 N. C., 8..... 768
Cain v. Rouse.....186 N. C., 176..... 262
Caldwell v. Justices..... 57 N. C., 323..... 324
Caldwell, Propst v. .....172 N. C., 594..... 748
Caldwell v. Robinson.....179 N. C., 518, 524.....398, 449
Call, Comrs. of Wilkes v.....123 N. C., 308, 319 798
Callender v. Sherman..... 27 N. C., 711..... 666
Calvert, Roberts v. ..... 96 N. C., 581..... 132
Cameron, Allen v. .....181 N. C., 120..... 507
Cameron v. Bennett.....110 N. C., 277..... 251
Cameron v. Hicks.....141 N. C., 26..... 815
Cameron, S. v. .....166 N. C., 384..... 39
Campbell v. Everhart.....139 N. C., 511..... 540
Campbell v. Murphy..... 55 N. C., 357..... 824
Campbell v. R. R.....159 N. C., 586..... 155
Canal Co., Cherry v.....140 N. C., 423..... 606
Candler, Sumner v. ..... 92 N. C., 635..... 463
Cardwell v. R. R.....146 N. C., 219..... 174
Carland, S. v..... 90 N. C., 668, 675.....471, 587
Carlton v. R. R.....104 N. C., 365..... 152
Caroon v. Cooper..... 63 N. C., 386..... 824, 826
Carpenter, Hawkins v. ..... 85 N. C., 482..... 463
Carpet Co., Stewart v.....138 N. C., 60, 66, 69..... 837
Carr v. Alexander.....169 N. C., 665..... 832
Carr v. Comrs. of Duplin.....136 N. C., 125..... 525, 526
Carroll, Fisher v. ..... 41 N. C., 485..... 579
Carrow, Tayloe v. .....156 N. C., 6..... 599
Carter v. Rountree.....109 N. C., 29..... 209
Carter v. Strickland.....165 N. C., 69..... 424
Casey, Weil v. .....125 N. C., 356..... 825
Cash Register Co. v. Townsend..137 N. C., 652, 655 342
Caveness v. R. R.....172 N. C., 305..... 156
Caviness v. Hunt.....180 N. C., 384, 386 209
Chambers v. Payne..... 59 N. C., 277..... 378
Charlotte, James v. .....183 N. C., 630, 632 416
Chatham v. Realty Co.....174 N. C., 671..... 232
Cheatham v. Bobbitt.....118 N. C., 343..... 463
Cheatham v. Young .....113 N. C., 161..... 335
Chemical Co., Brown v.....165 N. C., 421..... 155

Chemical Co. v. Edwards.....136 N. C., 76..... 822
Cherokee Co. v. Meroney.....173 N. C., 653..... 810
Cherokee County, R. R. v.....177 N. C., 86..... 323
Cherry v. Canal Co.....140 N. C., 423..... 606
Chesson v. Lynch.....186 N. C., 626..... 373
Chewning v. Mason.....158 N. C., 578, 579.....139, 507
Childerhose, Lumber Co. v.....167 N. C., 34..... 613
Christenbury v. King..... 85 N. C., 230..... 31
Christman v. Hilliard.....167 N. C., 6..... 167
Chronicle, Paper Co. v.....115 N. C., 149..... 832
Church v. Ange.....161 N. C., 314..... 625
Church v. Bragaw.....144 N. C., 126..... 625
Churchill v. Ins. Co..... 88 N. C., 205..... 420
Clapp v. Coble..... 21 N. C., 177..... 665
Clarke v. Aldridge.....162 N. C., 326..... 746
Clark v. Farrar..... 74 N. C., 686..... 256
Clark, Hyatt v. .....169 N. C., 178..... 606
Clark v. R. R.....109 N. C., 443, 444 151
Clark v. Sweaney.....175 N. C., 280, 282.....352, 799
Clark v. Sweaney.....176 N. C., 529..... 799
Clary v. Clary..... 24 N. C., 78..... 116
Clegg, Cobb v. .....137 N. C., 153..... 262
Clegg, Cobb v. .....137 N. C., 153..... 411
Clegg v. Clegg.....186 N. C., 40..... 731, 735
Clement, Gaither v. .....183 N. C., 451..... 848
Clements v. Ins. Co.....155 N. C., 57..... 342
Cline v. Lemon..... 4 N. C., 323..... 326
Cline v. Rudisill.....126 N. C., 523..... 170
Clinton v. Johnson.....174 N. C., 286..... 204
Cobb v. Clegg.....137 N. C., 153..... 262, 411
Coble, Clapp v. ..... 21 N. C., 177..... 665
Coble v. Comrs. of Guilford.....184 N. C., 342, 348..... 129, 133, 134, 203, 247
Coble, S. v. .....181 N. C., 554..... 511
Cockman, S. v. ..... 60 N. C., 485..... 588
Cody, S. v.....119 N. C., 908..... 587
Coggins v. Ins. Co.....144 N. C., 14..... 102
Cohen v. Comrs. of Goldsboro.... 77 N. C., 890..... 548
Cohoon, Spencer v..... 18 N. C., 27..... 326
Cohoon v. Upton.....174 N. C., 91..... 537
Coit, Mauney v. ..... 80 N. C., 300..... 568
Coit, Mauney v. ..... 86 N. C., 471..... 568
Cole v. Bank.....186 N. C., 514..... 785
Cole v. Laws.....104 N. C., 657..... 418
Cole v. Thornton.....180 N. C., 90, 91.....540, 756
Coleman, S. v. .....178 N. C., 760, 762 404
Coletrain v. Laughlin.....157 N. C., 282..... 747
College v. Riddle.....165 N. C., 211..... 625
Collie v. Comrs. of Franklin.....145 N. C., 170..... 690
Collins, Benton v. .....125 N. C., 94..... 651
Collins v. Gooch..... 97 N. C., 186..... 338
Collins v. Swanson.....121 N. C., 67..... 31
Comrs. of Alamance, R. R. v..... 91 N. C., 454..... 287
Comrs. of Alexander, Moose v...172 N. C., 419, 428 324
Comrs. of Beaufort, Parvin v.....177 N. C., 508..... 323, 324
Comrs. of Bladen, Burney v.....184 N. C., 277..... 75

Comrs. of Bladen, Perry v.....183 N. C., 387, 392..... 133, 246, 559, 560, 772
Comrs. of Bladen, R. R. v.....178 N. C., 449..... 323
Comrs. of Buncombe, Felmet v...186 N. C., 251..... 490
Comrs. of Buncombe v. Payne..123 N. C., 432, 490 798
Comrs. of Buncombe v. Scales..171 N. C., 523..... 578
Comrs. of Cabarrus, Phifer v.....157 N. C., 150..... 37
Comrs. of Carthage, McLeod v....148 N. C., 77..... 672
Comrs. of Chowan, Moran v.....168 N. C., 289..... 325
Comrs. of Chowan, White v..... 90 N. C., 437..... 247
Comrs. of Craven, Williams v...119 N. C., 520..... 323, 324
Comrs. of Davie, Cain v..... 86 N. C., 8..... 768
Comrs. of Duplin, Carr v.....136 N. C., 125..... 525, 526
Comrs. of Durham v. Tob. Co...116 N. C., 446..... 281
Comrs. of Forsyth, Belo v..... 82 N. C., 415..... 281, 283
Comrs. of Franklin, Collie v.....145 N. C., 170..... 690
Comrs. of Franklin, Cooper v.....184 N. C., 615..... 598
Comrs. of Gaston, Shuford v. .... 86 N. C., 552..... 768
Comrs. of Goldsboro, Cohen v... 77 N. C., 890..... 548
Comrs. of Granville v. Ballard.. 69 N. C., 18..... 134
Comrs. of Greene v. Comrs. of Lenoir ..... 92 N. C., 180..... 768
Comrs. of Guilford, Coble v.....184 N. C., 342, 348..... 129, 133, 134, 203, 247
Comrs. of Johnston, Board of Education v. .....183 N. C., 300, 302..... 75, 77, 690
Comrs. of Lenoir, Comrs. of Greene v. ..... 92 N. C., 180..... 768
Comrs. of Lenoir, Parks v.....186 N. C., 498, 499.....90, 52, 204, 210, 683
Comrs. of Lexington, Smith v...176 N. C., 466..... 722
Comrs. of Madison, Jones v.....137 N. C., 579..... 689
Comrs. of Mecklenburg, R. R. v...148 N. C., 220, 240 324
Comrs. of Nash, Edwards v.....183 N. C., 60..... 75, 77
Comrs. of Nash, Proctor v.....182 N. C., 59..... 204
Comrs. of New Hanover v. De-Rosset .....129 N. C., 275, 280 798
Comrs. of New Hanover, Harper v. .....133 N. C., 106..... 769
Comrs. of Person, Jones v.....107 N. C., 248, 265.....132, 324
Comrs. of Pitt, Davenport v.....163 N. C., 147..... 131
Comrs. of Pitt, Supervisors v.....169 N. C., 548..... 21
Comrs. of Pitt, Tripp v.....158 N. C., 180..... 672
Comrs. of Robeson, McCormac v. ..... 90 N. C., 441..... 247
Comrs. of Richmond, Long v..... 76 N. C., 273..... 322
Comrs. of Rowan, Lane v.....139 N. C., 443..... 525
Comrs. of Rutherford, Redmond v. ..... 87 N. C., 122..... 272
Comrs. of Sampson, Vann v.....185 N. C., 168, 171.....133, 246
Comrs. of Scotland, Gibson v.....163 N. C., 511..... 132
Comrs. of Stanly, Marshall v..... 89 N. C., 103..... 52
Comrs. of Stokes v. George.....182 N. C., 414..... 496
Comrs. of Stokes, Jones v.....143 N. C., 59..... 247
Comrs. of Surry, Jackson v.....171 N. C., 379..... 324
Comrs. of Wake, Busbee v..... 93 N. C., 144..... 768
Comrs. of Wake, Pullen v..... 66 N. C., 363..... 267
Comrs. of Wake, R. R. v..... 87 N. C., 426..... 272

Comrs. of Wayne, Hicks v.....183 N. C., 394.....133, 246, 560
Comrs. of Wilkes v. Call.....123 N. C., 308, 319 798
Comrs. of Yadkin, Board of
Education v. .....182 N. C., 571..... 712
Condor v. Secrest.....149 N. C., 205..... 540
Conley v. R. R.....109 N. C., 692..... 82
Constr. Co., Delafield v.....115 N. C., 21..... 386
Constr. Co., McCausland v.....172 N. C., 708..... 415
Cook v. Mfg. Co.....182 N. C., 205..... 848
Cook, S. v.....162 N. C., 586..... 35
Cook v. Vickers.....141 N. C., 107..... 210
Cooper, Caroon v. ..... 63 N. C., 386.....824, 826
Cooper v. Comrs. of Franklin....184 N. C., 615..... 598
Cooper v. R. R.....140 N. C., 209..... 149
Cooper, S. v. ..... 83 N. C., 671..... 586
Cooperage Co., Winborne v.....178 N. C., 90..... 807
Coöperative Assn. v. Jones.....185 N. C., 265.....182, 261, 262, 341, 359, 368, 412
Coor v. Smith.....107 N. C., 430..... 746
Copland v. Tel. Co.....136 N. C., 13..... 658
Corey v. Hooker.....171 N. C., 229..... 344
Corporation, Anderson v.....155 N. C., 132, 135.....223, 809
Corporation Com. v. Bank.....164 N. C., 358..... 518
Corporation Com. v. Dunn.....174 N. C., 679, 681..... 267, 268, 823
Corporation Com., Pullen v.....152 N. C., 548, 553.....281, 672
Corporation Com. v. R. R.....170 N. C., 560..... 496
Cotton Co., Mason v.....148 N. C., 492..... 145, 613
Cotton Factory, Norfleet v.....172 N. C., 833..... 466
Cotton Mills, Bond v.....166 N. C., 20..... 232
Cotton Mills, Durham v.....141 N. C., 615..... 803
Cotton Mills, Reynolds v.....177 N. C., 412.....570, 575, 844
Cotton Mills, Ross v.....140 N. C., 115..... 837
Cotton Mills, Thigpen v.....151 N. C., 97..... 774
Cotton Mills v. Weil.....129 N. C., 452..... 237, 532
Cotton Mills Co., Finance Co. v..182 N. C., 408..... 234
Councill v. Bailey.....154 N. C., 54..... 219
Council, Davis v. ..... 92 N. C., 726..... 850
Cowan, Crook v. ..... 64 N. C., 743..... 345
Cox, Hargrove v. .....180 N. C., 360..... 666
Cox v. R. R. .....123 N. C., 604, 611 656
Cox v. R. R. .....126 N. C., 105..... 700
Cox v. R. R. .....149 N. C., 87..... 418
Cox v. R. R. .....149 N. C., 117..... 9
Cox, Ruffin v. ..... 71 N. C., 256..... 826
Cox, Southerland v. ..... 14 N. C., 394..... 594
Cox, S. v. .....153 N. C., 638..... 39
Craddock v. Brinkley.....177 N. C., 124..... 391
Crafts, Gadsden v.....171 N. C., 288..... 564
Crampton v. Ivie.....126 N. C., 894..... 352, 355
Craton, S. v..... 28 N. C., 179..... 470
Craven, Haywood v..... 4 N. C., 360..... 784
Craven, McGee v.....106 N. C., 351..... 222
Craycroff v. Morehead..... 67 N. C., 422..... 132
Creasman, Cab Co. v.....185 N. C., 551, 552 262
Credle, Emory v.....185 N. C., 3..... 167

Credle, S. v. ..... 91 N. C., 648 ..... 461, 462
Creech, Smith v. ..... 186 N. C., 187 139
Creecy v. Pearce ..... 69 N. C., 67 ..... 824, 825
Crenshaw v. Johnson ..... 120 N. C., 274 116
Crews v. Crews ..... 175 N. C., 169 538
Cromartie v. Parker ..... 121 N. C., 198 774
Crook v. Cowan ..... 64 N. C., 743 345
Crowell, Fay v. ..... 184 N. C., 417 82
Crump v. Mims ..... 64 N. C., 767 21
Crumpler v. Hines ..... 174 N. C., 284 389
Crutchfield v. Rowe ..... 184 N. C., 213 503
Cullens v. Cullens ..... 161 N. C., 344 540
Culp v. Stanford ..... 112 N. C., 664 212
Cunningham v. Long ..... 186 N. C., 526 ..... 41, 579
Cureton v. Moore ..... 55 N. C., 207 628
Currie v. Mining Co. ..... 157 N. C., 218, 220 ..... 371, 606
Currituck v. Dare ..... 79 N. C., 566 134
Currituck, Dare v. ..... 95 N. C., 189, 190 ..... 134, 247
Cuthbertson v. Austin ..... 152 N. C., 336 850

D

Dail, Dickerson v. ..... 159 N. C., 541 85
Dail v. Taylor ..... 151 N. C., 284 837
Dailey, Pritchard v. ..... 168 N. C., 332 ..... 197, 342
Dale, Roberts v. ..... 171 N. C., 466 745
Dalton, S. v. ..... 178 N. C., 779 662
Dancy v. Sugg ..... 19 N. C., 515 654
Daniel, Purnell v. ..... 43 N. C., 9 411
Daniel v. R. R. ..... 136 N. C., 517 503
Daniel v. Wilkerson ..... 35 N. C., 329 578
Daniels v. R. R. ..... 158 N. C., 428 652
Daniels, S. v. ..... 134 N. C., 641 699
Darden v. Steamboat Co. ..... 107 N. C., 437, 446 335
Dare, Currituck v. ..... 79 N. C., 566 134
Dare v. Currituck ..... 95 N. C., 189, 190 ..... 134, 247
Davenport v. Bd. of Education ..... 183 N. C., 570 495
Davenport v. Comrs. of Pitt ..... 163 N. C., 147 131
Davidson v. Gifford ..... 100 N. C., 22 831
Davidson, S. v. ..... 172 N. C., 944 25
Davis v. Bd. of Education ..... 186 N. C., 233 131
Davis v. Council ..... 92 N. C., 726 850
Davis v. Davis ..... 83 N. C., 71 665
Davis v. Davis ..... 146 N. C., 166 614
Davis, Gore v. ..... 124 N. C., 234 454
Davis v. Lumber Co. ..... 130 N. C., 176 237
Davis, Mfg. Co. v. ..... 147 N. C., 267 503
Davis, Packing Co. v. ..... 118 N. C., 548 237
Davis, R. R. v. ..... 19 N. C., 451 742
Davis v. R. R. ..... 147 N. C., 68 174
Davis v. Ramsey ..... 50 N. C., 236 20
Davis, Reeves v. ..... 80 N. C., 209 335
Davis, S. v. ..... 77 N. C., 483 723
Davis, S. v. ..... 80 N. C., 412 ..... 586, 588
Davis, S. v. ..... 109 N. C., 780 585

Davis, S. v. ..... 134 N. C., 633 37
Davis, S. v. ..... 150 N. C., 853 198
Dawson v. Wood ..... 177 N. C., 163 75
Day v. Howard ..... 73 N. C., 4 31
Deans v. R. R. ..... 107 N. C., 686 152
DeBerry v. Nicholson ..... 102 N. C., 465 132
Deford, Sanderlin v. ..... 47 N. C., 74 378
DeHart, Hyatt v. ..... 140 N. C., 270 ..... 52, 130, 255
Delafield v. Construction Co. ..... 115 N. C., 21 386
Denny, Milliken v. ..... 141 N. C., 224 ..... 19, 21
DeRosset, Comrs. of New Hanover v. ..... 129 N. C., 275, 280 798
Dick v. Pitchford ..... 21 N. C., 480 63
Dickerson v. Dail ..... 159 N. C., 541 85
Dickerson, Moring v. ..... 85 N. C., 466 825
Dill, S. v. ..... 184 N. C., 650 572
Dills v. Fiber Co. ..... 175 N. C., 49 597
Director General, Lapish v. ..... 182 N. C., 593 ..... 149, 153
Dixon v. Green ..... 178 N. C., 205 5
Dixon, Herring v. ..... 122 N. C., 420 ..... 322, 324
Dixon, S. v. ..... 114 N. C., 748, 750 479
Dixon, S. v. ..... 185 N. C., 727 35
Donnell v. Mateer ..... 40 N. C., 7 64
Donnell v. Mateer ..... 42 N. C., 94 746
Door Co. v. Joyner ..... 182 N. C., 520 603
Dorsey v. Mining Co. ..... 177 N. C., 60 448
Doub, Aden v. ..... 146 N. C., 10 16
Doub, Helsabeck v. ..... 167 N. C., 205 461
Doughton, Person v. ..... 186 N. C., 723 ..... 203, 280, 283, 287
Dowd, Supply Co. v. ..... 146 N. C., 191 523
Dowdy, S. v. ..... 145 N. C., 432, 436 35
Dowell, S. v. ..... 106 N. C., 722 96
Downing, Atkinson v. ..... 175 N. C., 244 515
Doyle v. Brown ..... 72 N. C., 393 209
Dozier, Sawyer v. ..... 52 N. C., 7 140
Drainage Comrs. v. Spencer ..... 174 N. C., 36 209
Driver, S. v. ..... 78 N. C., 423 480
Drug Co., Bank v. ..... 152 N. C., 142 777
Drum v. Miller ..... 135 N. C., 215 295
Dudley v. R. R. ..... 180 N. C., 34, 36 ..... 641, 647, 648, 649
Dudley v. Tyson ..... 167 N. C., 67 209
Duffy v. Hartsfield ..... 180 N. C., 151 251
Duffy v. Meadows ..... 131 N. C., 31 251
Dula, S. v. ..... 61 N. C., 437 722
Dunn, Corporation Com. v. ..... 174 N. C., 679, 681 ..... 267, 268, 823
Dunn v. Hines ..... 164 N. C., 114, 117 507
Dunn, Ligon v. ..... 28 N. C., 137 568
Dunn v. Lumber Co. ..... 172 N. C., 129 848
Dunn v. Marks ..... 141 N. C., 232 446
Dunn, Robertson v. ..... 87 N. C., 191 777
Dunn, Scott v. ..... 21 N. C., 425 398
Dunn, Williams v. ..... 158 N. C., 399 747
Dupree v. Dupree ..... 45 N. C., 164 ..... 540, 756, 757
Durfey, Norris v. ..... 168 N. C., 321 267
Durham, Bramham v. ..... 171 N. C., 198 490

Durham v. Cotton Mills....141 N. C., 615.... 803
Durham, Osborne v....157 N. C., 262.... 527
Durham v. R. R....113 N. C., 240.... 863
Durham, Riggsbee v.... 98 N. C., 81.... 132
Durham v. Riggsbee....141 N. C., 132.... 742
Durham, Vickers v....132 N. C., 890.... 548
Duval v. R. R....134 N. C., 331, 334.... 351, 352, 355

E

Early v. Early....134 N. C., 269.... 378
Early, Ely v.... 94 N. C., 1.... 579, 581
Early, Minton v....183 N. C., 200.... 704, 705
Earnheart, Newsome v.... 86 N. C., 391.... 132
Eatman, Taylor v.... 92 N. C., 601, 607.... 602, 815, 816
Eaton v. Graded School....184 N. C., 471.... 488
Eatough, Tucker v....186 N. C., 505, 509.... 46, 47, 52, 53, 406
Edens, S. v.... 85 N. C., 524.... 586
Edwards, Chemical Co. v....136 N. C., 76.... 822
Edwards v. Comrs. of Nash....183 N. C., 60.... 75, 77
Edwards v. Erwin....148 N. C., 429, 430.... 335, 502
Edwards, Francis v.... 77 N. C., 271.... 503
Edwards v. R. R....129 N. C., 79, 349.... 350, 353
Edwards v. Tipton.... 77 N. C., 222, 226.... 326
Edwards, Vann v....130 N. C., 72.... 777
Efland v. R. R....146 N. C., 139.... 535
Efler, S. v.... 85 N. C., 585.... 23
Electric Co., Mitchell v....129 N. C., 169.... 837
Electric Co., Overcash v....144 N. C., 572, 582.... 9
Electric R. R., Smith v....173 N. C., 489.... 299
Eller, Lawrence v....169 N. C., 211.... 665
Ellett v. Newman.... 92 N. C., 519.... 262
Ellington v. R. R....170 N. C., 36.... 173
Elliott v. Furnace Co....179 N. C., 145.... 150
Elliott v. R. R....155 N. C., 236.... 174
Ellis v. R. R.... 24 N. C., 138.... 850
Ellison v. Rix.... 85 N. C., 80.... 567
Ely v. Early.... 94 N. C., 1.... 579, 581
Ely, R. R. v.... 95 N. C., 77.... 210
Ely, Stevens v.... 16 N. C., 493.... 784
Emerson, Ledford v....138 N. C., 502.... 462
Emery, S. v.... 98 N. C., 668.... 573
Emory v. Credle....185 N. C., 3.... 167
Engine Co., Alpha Mills v....116 N. C., 802.... 503
Engineering Co., Lane v....183 N. C., 307.... 828
English v. English.... 87 N. C., 497.... 390, 606
English, S. v....164 N. C., 497.... 587
Eppley v. Bryson City....157 N. C., 487.... 204
Erskine v. Motors Co....185 N. C., 486.... 829
Erwin, Edwards v....148 N. C., 429, 430.... 335, 502
Estes, S. v....185 N. C., 752.... 716
Eubanks v. Becton....158 N. C., 233.... 454
Evans v. Freeman....142 N. C., 61.... 809
Evans v. Monot.... 57 N. C., 227, 228, 277.... 283
Evans v. R. R.... 96 N. C., 47.... 131

Everett v. Austin....169 N. C., 622.... 376
Everett, Kornegay v.... 99 N. C., 30.... 579
Everett v. Newton....118 N. C., 919.... 816
Everhardt v. Adderton....175 N. C., 403, 406.... 32
Everhart, Campbell v....139 N. C., 511.... 540
Everitt, S. v....164 N. C., 399.... 611
Express Co., Byrd v....139 N. C., 273.... 241
Express Co., Hosiery Co. v....186 N. C., 556.... 85
Express Co., Parks v....185 N. C., 428.... 279
Exum v. Baker....115 N. C., 242.... 745, 746
Exum, Bank v....163 N. C., 202.... 237
Exum v. Bowden.... 39 N. C., 281.... 337
Exum v. R. R....154 N. C., 413.... 148, 151
Exum, S. v....138 N. C., 599, 600....572, 850

F

Fain, *In re*....172 N. C., 790.... 515
Faison v. Williams....121 N. C., 152.... 747
Falkner, S. v....182 N. C., 799.... 422
Falls, Rudasill v.... 92 N. C., 226.... 527
Farmer v. Batts.... 83 N. C., 387.... 221
Farrar, Clark v.... 74 N. C., 686.... 256
Farrington, Sexton v....185 N. C., 339.... 6, 32
Faust v. Rohr....167 N. C., 360.... 17
Fawcett v. Mount Airy....134 N. C., 125.... 490
Fay v. Crowell....184 N. C., 417.... 82
Feed Co., Worth v....172 N. C., 342.... 237
Felmet v. Comrs. of Buncombe....186 N. C., 251.... 490
Ferebee, Grandy v.... 68 N. C., 356.... 503
Ferebee v. R. R....167 N. C., 296.... 39
Ferguson, S. v....107 N. C., 846.... 461
Fertilizer Works, Proctor v....183 N. C., 153.... 262
Fiber Co., Dills v....175 N. C., 49.... 597
Fiber Co., Westerman v....162 N. C., 294.... 358
Finance Co. v. Cotton Mills Co...182 N. C., 408.... 234
Finch v. Gregg....126 N. C., 176.... 612
Finley, Wellborn v.... 52 N. C., 228, 237.... 603
Fisher v. Carroll.... 41 N. C., 485.... 579
Fisher v. Lumber Co....183 N. C., 485, 489, 490....17, 503, 530
Fisher v. New Bern....140 N. C., 512.... 295
Fisher v. Webb.... 84 N. C., 44.... 17
Fitzgerald v. R. R....141 N. C., 530.... 837
Fleming, Hoke v.... 32 N. C., 263.... 849
Fleming v. R. R....131 N. C., 476.... 299
Fleming v. R. R....160 N. C., 196.... 83
Flinn, Marshall v.... 49 N. C., 199.... 5
Flournoy, Vick v....147 N. C., 209.... 376
Fogleman, S. v....164 N. C., 461.... 39, 461, 469, 723
Foil v. Newsome....138 N. C., 115, 123.... 815
Forbes v. Tarboro....185 N. C., 59.... 769
Fore v. Tanning Co....175 N. C., 584.... 739
Foreman v. Hough.... 98 N. C., 386.... 747
Fortune v. Hunt....149 N. C., 358.... 41
Foster, S. v....185 N. C., 674.... 94

Foster v. Woodfin..... 65 N. C., 29..... 327
Foundry Co. v. Aluminum Co.....172 N. C., 704, 706..... 466
Fowler, S. v. .....151 N. C., 732..... 471
Fowler v. Webster.....173 N. C., 442..... 65
Foy, Whitford v. ..... 71 N. C., 527..... 339
Francis v. Edwards..... 77 N. C., 271..... 503
Francks v. Whitaker.....116 N. C., 518..... 507
Franklin, Hayes v. .....141 N. C., 599..... 625
Frazier, S. v.....118 N. C., 1258..... 722
Freeman, Evans v.....142 N. C., 61..... 809
Freeman, Hobby v. .....183 N. C., 240..... 665
Freeman, S. v.....146 N. C., 615, 618.....699, 700
French, S. v. .....109 N. C., 722..... 572
Fulcher, S. v.....184 N. C., 663, 665.....153, 805
Fulford, S. v.....124 N. C., 798..... 25
Fulghum, Spicer v..... 67 N. C., 19..... 810
Fuller, Smith v.....152 N. C., 13..... 675
Fulwood v. Fulwood.....161 N. C., 601..... 85
Furnace Co., Elliott v.....179 N. C., 145..... 150
Furniture Co. v. Bussell .....171 N. C., 485..... 503
Futch, Quelch v.....172 N. C., 316..... 156
Futch v. R. R.....178 N. C., 284..... 39

G

Gadsden v. Crafts.....171 N. C., 288..... 564
Gaither v. Clement .....183 N. C., 451..... 848
Gallagher, Satterwhite v.....173 N. C., 528..... 764
Galloway v. McKeithan..... 27 N. C., 12..... 326
Gambrill v. Wilcox .....111 N. C., 42..... 112
Gammon v. Johnson .....126 N. C., 64..... 112
Gant, Troxler v.....173 N. C., 425..... 32
Gardner, S. v. .....104 N. C., 739..... 585
Garland v. Improvement Co.....184 N. C., 551..... 810
Garris, Whitfield v.....131 N. C., 148..... 537
Gash, S. v.....177 N. C., 595..... 609
Gaskins v. R. R.....151 N. C., 19..... 143
Gatlin, Saunders v..... 21 N. C., 92..... 31
Gatlin v. Tarboro..... 78 N. C., 119..... 620
Gay v. Baker..... 58 N. C., 344..... 540
Gaylord v. Gaylord.....150 N. C., 222..... 41, 580
George, Comrs. of Stokes v.....182 N. C., 414..... 496
George, S. v..... 30 N. C., 324..... 849
Gervin v. Meredith..... 4 N. C., 439..... 654
Gibbon, Alexander v.....118 N. C., 796..... 31
Gibson v. Comrs. of Scotland.....163 N. C., 511..... 132
Gidney, Mauney v. ..... 88 N. C., 200, 202, 203.....390, 605, 606
Gifford, Davidson v.....100 N. C., 22..... 831
Gilbert v. James..... 86 N. C., 244..... 503
Giles, Lee v. .....161 N. C., 541..... 822
Gillespie v. Allison.....115 N. C., 542..... 753
Gillespie, Poston v. ..... 58 N. C., 258..... 5
Gilmer, Smith v..... 64 N. C., 546..... 826
Gladden, Nichols v.....117 N. C., 497..... 537
Glenn v. Orr ..... 96 N. C., 413..... 335

Glen, S. v. ..... 52 N. C., 321 803
Glisson v. Glisson ..... 153 N. C., 185 209
Goff v. R. R. ..... 179 N. C., 216 ..... 19, 21, 150, 350, 353, 646
Goldsboro, R. R. v. ..... 155 N. C., 359, 363 642
Gooch, Collins v. ..... 97 N. C., 186 338
Gooch, McLeod v. ..... 162 N. C., 122 605
Gooding v. Moore ..... 150 N. C., 195 17
Goodman v. Power Co. ..... 174 N. C., 661 430
Goodman v. White ..... 174 N. C., 399 776
Goodson v. Goodson ..... 41 N. C., 238, 242 337
Goodson, S. v. ..... 107 N. C., 798 483
Gore v. Davis ..... 124 N. C., 234 454
Gore v. Townsend ..... 105 N. C., 228, 235 ..... 824, 825
Gorham, *In re* ..... 177 N. C., 275 461
Graded School, Eaton v. ..... 184 N. C., 471 488
Graded School, Heckert v. ..... 184 N. C., 475 437
Grady v. Bank ..... 184 N. C., 162 518
Graham, Peebles v. ..... 128 N. C., 225 507
Graham, S. v. ..... 74 N. C., 646 699
Grandy v. Ferebee ..... 68 N. C., 356 503
Granite Co. v. Bank ..... 172 N. C., 354 466
Gray v. Little ..... 127 N. C., 306 651
Gray v. West ..... 93 N. C., 442 595
Green, Dixon v. ..... 178 N. C., 205 5
Greene v. Owen ..... 125 N. C., 212, 222 325
Greenlee v. R. R. ..... 122 N. C., 977 ..... 299, 648
Greenville, Jeffress v. ..... 154 N. C., 492, 500 ..... 495, 742
Greer, S. v. ..... 173 N. C., 759 611
Gregg, Finch v. ..... 126 N. C., 176 612
Griffice, S. v. ..... 74 N. C., 316 586
Griffin, Hassell v. ..... 55 N. C., 117, 119 821
Griffin v. Lumber Co. ..... 140 N. C., 514 342
Griffin, S. v. ..... 154 N. C., 611 ..... 704, 705
Griffith, S. v. ..... 185 N. C., 759 ..... 60, 700, 723
Griggs, Tarlton v. ..... 131 N. C., 216 41
Grimes, Andrews v. ..... 148 N. C., 437 462
Grissom, Allen v. ..... 90 N. C., 90 821
Grocery Co. v. Vernoy ..... 167 N. C., 428 503
Grocery Co., Womble v. ..... 135 N. C., 474 ..... 9, 837, 850
Groom, Brodnax v. ..... 64 N. C., 244 324
Groves, S. v. ..... 119 N. C., 822 25
Groves v. Ware ..... 182 N. C., 553 496
Guano Co., Moore v. ..... 130 N. C., 229 584
Gunter v. Sanford ..... 186 N. C., 452 ..... 61, 203, 768, 769
Gwathmey v. Pearce ..... 74 N. C., 398 ..... 824, 825
Gwyn v. R. R. ..... 85 N. C., 430 ..... 173, 174

H

Haddock v. Stocks ..... 167 N. C., 70 746
Hafner v. Irwin ..... 20 N. C., 570 ..... 692, 756
Haggard v. Mitchell ..... 180 N. C., 255 21
Hahn, Smith v. ..... 80 N. C., 241 390
Hairston, S. v. ..... 121 N. C., 579 24
Hale v. Rocky Mount Mills ..... 186 N. C., 51 39

Hale v. Whitehead ..... 115 N. C., 29 586
Hall v. Artis ..... 186 N. C., 105 747
Hall, Hinton v. ..... 166 N. C., 477 365
Hall, Mann v. ..... 163 N. C., 51, 54 ..... 390, 420, 445
Hall v. Misenheimer ..... 137 N. C., 186 761
Hall, S. v. ..... 183 N. C., 806 847
Hallsey, Norman v. ..... 132 N. C., 6 112
Hallyburton v. Slagle ..... 132 N. C., 947 603
Hamilton, *In re* ..... 182 N. C., 44 ..... 511, 512
Hamilton, Yow v. ..... 136 N. C., 357 654
Hampton v. Waldrop ..... 104 N. C., 453 132
Hancock v. Southgate ..... 186 N. C., 281 ..... 2, 96, 237
Haney, S. v. ..... 19 N. C., 390 728
Hanie, Baber v. ..... 163 N. C., 588 112
Hanna v. Hanna ..... 89 N. C., 68 593
Hardin, S. v. ..... 19 N. C., 407 728
Hardin, S. v. ..... 183 N. C., 815 611
Harding, Brown v. ..... 171 N. C., 686, 691 398
Harding v. Long ..... 103 N. C., 1, 9 ..... 579, 581
Hardware Co. v. Buhmann ..... 159 N. C., 512 390
Hardware Co. v. Schools ..... 151 N. C., 507 466
Hardwood Co., Winslow v. ..... 147 N. C., 275 9
Hardy v. Hardy ..... 174 N. C., 505 424
Hardy v. Holly ..... 84 N. C., 667 815
Hargett v. Bell ..... 134 N. C., 395 548
Hargrave, S. v. ..... 100 N. C., 484 586
Hargrove v. Adcock ..... 111 N. C., 171 761
Hargrove, Brewington v. ..... 178 N. C., 146 365
Hargrove v. Cox ..... 180 N. C., 360 666
Hargrove v. Wilson ..... 148 N. C., 439 209
Harper v. Comrs. of New Hanover ..... 133 N. C., 106 769
Harper, Ruark v. ..... 178 N. C., 252 32
Harper v. Supply Co. ..... 184 N. C., 204 ..... 98, 491
Harrell, March v. ..... 46 N. C., 329 849
Harrington, Buchanan v. ..... 152 N. C., 333 748
Harrington v. Rawls ..... 131 N. C., 39 52
Harris, Bank v. ..... 96 N. C., 118 522
Harris, Baynes v. ..... 160 N. C., 307 578
Harris v. Bennett ..... 160 N. C., 347 606
Harris, McLawhorn v. ..... 156 N. C., 111 32
Harris v. Mangum ..... 183 N. C., 235 294
Harris v. R. R. ..... 153 N. C., 542 803
Harriss v. Wright ..... 121 N. C., 178 247
Harrison v. Bryan ..... 148 N. C., 315 413
Hart, Sloan v. ..... 150 N. C., 269 ..... 665, 667
Hart, S. v. ..... 186 N. C., 589 310
Hartman, Williamson v. ..... 92 N. C., 236 606
Harton v. Tel. Co. ..... 141 N. C., 455 295
Hartsfield, Duffy v. ..... 180 N. C., 151 251
Hartzog v. Hubbard ..... 19 N. C., 241 654
Harven, Springs v. ..... 56 N. C., 96 398
Harvey v. Pettaway ..... 156 N. C., 375 714
Harward, Lester v. ..... 173 N. C., 83, 85 ..... 163, 448
Haskins v. Royster ..... 70 N. C., 601 231

Hassell, Bailey v. ..... 184 N. C., 451 484
Hassell v. Griffin ..... 55 N. C., 117, 119 821
Hassell, Williams v. ..... 74 N. C., 434 752
Hatcher, Bank v. ..... 151 N. C., 359 613
Hawkins v. Carpenter ..... 85 N. C., 482 643
Hawkins v. Long ..... 74 N. C., 781 658
Hawley, S. v. ..... 186 N. C., 433 96
Hayes v. Franklin ..... 141 N. C., 599 625
Haynes v. R. R. ..... 143 N. C., 154 300
Haywood v. Craven ..... 4 N. C., 360 784
Haywood, S. v. ..... 94 N. C., 847 585
Heath v. Heath ..... 114 N. C., 547 540
Heckert v. Graded School ..... 184 N. C., 475 437
Hedgecock, S. v. ..... 185 N. C., 714 96
Hedgepeth, *In re* ..... 150 N. C., 251 119
Hedgepeth, Williams v. ..... 184 N. C., 116 342
Heilig v. Stokes ..... 63 N. C., 612 411
Helms v. Helms ..... 135 N. C., 171 595
Helms v. Helms ..... 137 N. C., 207 595
Helsabeck v. Doub ..... 167 N. C., 205 461
Hemphill v. Hemphill ..... 99 N. C., 436 579
Hemphill v. Lumber Co. ..... 141 N. C., 487, 488 ..... 294, 429, 430
Hemphill, Wright v. ..... 81 N. C., 33 418
Hendersonville v. Jordan ..... 150 N. C., 35 132
Hendersonville, Yowmans v. ..... 175 N. C., 579 709
Henry v. Rich ..... 64 N. C., 379 832
Hensley, S. v. ..... 94 N. C.,1021 584
Herndon, Longmire v. ..... 72 N. C., 629 255
Herring v. Dixon ..... 122 N. C., 420 ..... 322, 324
Herring, Witherington v. ..... 140 N. C., 497 783
Hester v. Hester ..... 37 N. C., 340 783
Hewett, Lehew v. ..... 138 N. C., 6 579
Heyer v. Beatty ..... 76 N. C., 28 666
Hickory, Ingold v. ..... 178 N. C., 614 416
Hicks, Cameron v. ..... 141 N. C., 26 815
Hicks v. Comrs. of Wayne ..... 183 N. C., 394 ..... 133, 246, 560
Hicks, Hinton v. ..... 156 N. C., 24 825
Hicks, Kerr v. ..... 154 N. C., 268 47
Hicks v. Skinner ..... 71 N. C., 543 843
Higdon, Phillipse v. ..... 44 N. C., 380 327
High v. R. R. ..... 112 N. C., 385 148
Hight, S. v. ..... 150 N. C., 817 315
Highway Com., Peters v. ..... 184 N. C., 30, 32 ..... 131, 132
Highway Com., Woodall v. ..... 176 N. C., 388 132
Higson v. Ins. Co. ..... 153 N. C., 40 739
Hildebrand v. Vanderbilt ..... 147 N. C., 639 ..... 465, 466
Hill v. R. R. ..... 178 N. C., 612 251
Hill, Register Co. v. ..... 136 N. C., 277 709
Hill v. Skinner ..... 169 N. C., 409 132
Hill, S. v. ..... 166 N. C., 298 704
Hill, Whitaker v. ..... 96 N. C., 2 52
Hilliard, Christman v. ..... 167 N. C., 6 167
Hillsboro, Brown v. ..... 185 N. C., 368 75
Hines, Brickell v. ..... 179 N. C., 254 512

Hines, Crumpler v. ..... 174 N. C., 284 389
Hines, Dunn v. ..... 164 N. C., 114, 117 507
Hines, Kimbrough v. ..... 180 N. C., 285 354
Hines, Loftin v. ..... 107 N. C., 360 256
Hines v. Lumber Co. ..... 174 N. C., 294 299
Hines, White v. ..... 182 N. C., 276, 288, 289, 294 839
Hinkle v. R. R. ..... 109 N. C., 472 646
Hinton v. Hicks ..... 156 N. C., 24 825
Hinton v. Hall ..... 166 N. C., 477 365
Hinton, Overton v. ..... 123 N. C., 1 826
Hite, S. v. ..... 141 N. C., 769 716
Hobbs, King v. ..... 139 N. C., 170 579
Hobby v. Freeman ..... 183 N. C., 240 665
Hodges, Hughes v. ..... 102 N. C., 237, 240 674
Hodges v. Lassiter ..... 96 N. C., 351 ..... 585, 719
Hoggard, S. v. ..... 180 N. C., 678 611
Hoge v. Lee ..... 184 N. C., 44, 50 654
Hoke v. Fleming ..... 32 N. C., 263 849
Holland v. Peck ..... 37 N. C., 255 ..... 783, 784
Holland, S. v. ..... 83 N. C., 624, 625 728
Holleman v. Trust Co. ..... 185 N. C., 49 613
Hollifield v. Tel. Co. ..... 172 N. C., 714 ..... 739, 740
Hollingsworth, Bullard v. ..... 140 N. C., 634 654
Hollingsworth v. Supreme Council ..... 175 N. C., 615 342
Hollister Co., Overall Co. v. ..... 186 N. C., 208 422
Holly, Hardy v. ..... 84 N. C., 667 815
Holly v. Holly ..... 94 N. C., 670 777
Holmes, Overall Co. v. ..... 186 N. C., 428, 431, 434 ..... 111, 701, 746
Holmes v. R. R. ..... 186 N. C., 63 162
Holmes, Smith v. ..... 167 N. C., 561 656
Holt v. Holt ..... 114 N. C., 242 424
Holt, S. v. ..... 90 N. C., 753 310
Holton, Sprinkle v. ..... 146 N. C., 266 459
Honeycutt, Williams v. ..... 176 N. C., 102 41
Hood v. Mercer ..... 150 N. C., 699 474
Hooker, Corey v. ..... 171 N. C., 229 344
Hopkins, Bailey v. ..... 152 N. C., 748 209
Hopkins, Bateman v. ..... 157 N. C., 470 221
Hopkins, S. v. ..... 154 N. C., 622 ..... 585, 719
Hopper, S. v. ..... 186 N. C., 411 720
Horne v. R. R. ..... 170 N. C., 660 153
Hornthal v. R. R. ..... 167 N. C., 627 848
Horton v. R. R. ..... 175 N. C., 472, 488 ..... 175, 176
Hosiery Co. v. Express Co. ..... 186 N. C., 556 85
Hospital v. R. R. ..... 157 N. C., 460 189
Hough, Foreman v. ..... 98 N. C., 386 747
Hough v. R. R. ..... 144 N. C., 700, 702 739
Houghtalling, Knight v. ..... 94 N. C., 408 746
Howard, Day v. ..... 73 N. C., 4 31
Howard v. R. R. ..... 122 N. C., 944 ..... 597, 739
Howard, S. v. ..... 82 N. C., 623 586
Howe, Wright v. ..... 52 N. C., 412 5
Howell v. Barnes ..... 64 N. C., 625 420
Howell v. Parker ..... 136 N. C., 373 826

Hubbard, Hartzog v. ..... 19 N. C., 241 654
Hudson, Lumber Co. v. ..... 153 N. C., 96 675
Hudson v. Morton ..... 162 N. C., 6 448
Hughes v. Hodges ..... 102 N. C., 237, 240 674
Hughes, Minton v. ..... 158 N. C., 586 390
Hullen, S. v. ..... 133 N. C., 656 492
Humphrey v. Lumber Co. ..... 174 N. C., 520 825
Humphrey, Thompson v. ..... 179 N. C., 44 601
Hunt, Caviness v. ..... 180 N. C., 384, 386 209
Hunt, Fortune v. ..... 149 N. C., 358 41
Hunt, McMichael v. ..... 83 N. C., 344 ..... 63, 64
Hunt v. R. R. ..... 170 N. C., 442 351
Hunt v. Satterwhite ..... 85 N. C., 73, 74 ..... 540, 756
Hunt, Taylor v. ..... 118 N. C., 168 503
Hunter v. Jameson ..... 28 N. C., 255 503
Hunter v. Kelly ..... 92 N. C., 285 448
Hyatt v. Clark ..... 169 N. C., 178 606
Hyatt v. DeHart ..... 140 N. C., 270 ..... 52, 130, 255
Hyder v. R. R. ..... 167 N. C., 584 597

I

Improvement Co., Garland v. ..... 184 N. C., 551 810
Ingold v. Hickory ..... 178 N. C., 614 416
Ingram v. Power Co. ..... 181 N. C., 359 251
Inheritance Tax, *In re* ..... 168 N. C., 356 267
Inheritance Tax, *In re* ..... 172 N. C., 174 753
In re Abee ..... 146 N. C., 373 5
In re Anderson ..... 132 N. C., 244 747
In re Brown ..... 185 N. C., 399 747
In re Burns' Will ..... 121 N. C., 336, 338 ..... 116, 383
In re Fain ..... 172 N. C., 790 515
In re Gorham ..... 177 N. C., 275 461
In re Hamilton ..... 182 N. C., 44 ..... 511, 512
In re Hedgepeth ..... 150 N. C., 251 119
In re Inheritance Tax ..... 168 N. C., 356 267
In re Inheritance Tax ..... 172 N. C., 174 753
In re Love ..... 186 N. C., 714 119
In re Martin ..... 185 N. C., 472 ..... 570, 844
In re Means ..... 176 N. C., 307, 311 515
In re Morris ..... 138 N. C., 262 267
In re Mueller's Will ..... 170 N. C., 30 383
In re Palmer's Will ..... 117 N. C., 134 179
In re Rawlings' Will ..... 170 N. C., 61 115
In re Sermon's Land ..... 182 N. C., 128 694
In re Shelton's Will ..... 143 N. C., 227 118
In re Smith's Will ..... 163 N. C., 464 ..... 6, 85, 860
In re Stone ..... 176 N. C., 337 747
In re Warren ..... 178 N. C., 43 515
In re Wolfe ..... 185 N. C., 565 119
In re Worth's Will ..... 129 N. C., 228 383
Ins. Co., Biggs v. ..... 88 N. C., 141 102
Ins. Co., Black v. ..... 148 N. C., 169 102
Ins. Co., Brock v. ..... 156 N. C., 112 9
Ins. Co., Churchill v. ..... 88 N. C., 205 420

Ins. Co., Clements v. 155 N. C., 57 ... 342
Ins. Co., Coggins v. 144 N. C., 14 ... 102
Ins. Co., Higson v. 153 N. C., 40 ... 739
Ins. Co. v. Knight 160 N. C., 592 ... 315
Ins. Co., Lancaster v. 153 N. C., 285 ... 101
Ins. Co., Lea v. 168 N. C., 478 ... 39
Ins. Co., Long v. 114 N. C., 466 ... 376
Ins. Co., Maynard v. 132 N. C., 711 ... 532
Ins. Co., Modlin v. 151 N. C., 35 ... 102
Ins. Co., Nelson v. 120 N. C., 302 ... 527
Ins. Co., Norfleet v. 160 N. C., 327 ... 821
Ins. Co., Phifer v. 123 N. C., 405, 409 ... 420, 445
Ins. Cos., Roper v. 161 N. C., 151 ... 103
Ins. Co., Sanders v. 183 N. C., 66 ... 411
Ins. Co., Sugg v. 98 N. C., 143 ... 102
Ins. Co., Watson v. 159 N. C., 638 ... 101
Ins. Co., Wilson v. 155 N. C., 173 ... 342
Investment Co. v. Tel. Co. 156 N. C., 259 ... 745
Irvin v. Jenkins 186 N. C., 752 ... 832
Irwin, Hafner v. 20 N. C., 570 ... 692, 756
Ivey, Moore v. 43 N. C., 193 ... 579
Ivie, Crampton v. 126 N. C., 894 ... 352, 355

J

Jackson, Baggett v. 160 N. C., 26 ... 747
Jackson v. Baird 148 N. C., 29 ... 31
Jackson, Brown v. 179 N. C., 363, 371 ... 281
Jackson v. Comrs. of Surry 171 N. C., 379 ... 324
Jackson v. Love 82 N. C., 405 ... 777
Jackson v. R. R. 181 N. C., 153 ... 646
Jackson, S. v. 13 N. C., 563 ... 404
Jackson, S. v. 183 N. C., 698 ... 390, 448
James v. Charlotte 183 N. C., 630, 632 ... 416
James, Gilbert v. 86 N. C., 244 ... 503
James v. Norris 57 N. C., 225 ... 257
Jameson, Hunter v. 28 N. C., 255 ... 503
Jarman v. Saunders 64 N. C., 367 ... 411, 606
Jefferson, S. v. 125 N. C., 712 ... 847
Jeffress, Anthony v. 172 N. C., 381 ... 518
Jeffress v. Greenville 154 N. C., 492, 500 ... 495, 742
Jeffress v. R. R. 158 N. C., 215 ... 37
Jeffries v. Aaron 120 N. C., 167, 169 ... 605, 606, 658
Jeffries, S. v. 117 N. C., 727 ... 722
Jenkins, Irvin v. 186 N. C., 752 ... 832
Jenkins v. Lambeth 172 N. C., 468 ... 816
Jenkins v. Long 170 N. C., 269 ... 811
Jenkins v. R. R. 155 N. C., 203 ... 646
Jessup, S. v. 183 N. C., 771 ... 609
Jestes, S. v. 185 N. C., 736 ... 85, 722
Johnson v. Allen 100 N. C., 137 ... 418
Johnson, Clinton v. 174 N. C., 286 ... 204
Johnson, Crenshaw v. 120 N. C., 274 ... 116
Johnson, Gammon v. 126 N. C., 64 ... 112
Johnson v. Johnson 38 N. C., 426 ... 784

Johnson v. Jones ..... 186 N. C., 234 262
Johnson, Lee v. ..... 31 N. C., 19 628
Johnson, Lumber Co. v. ..... 177 N. C., 51 503
Johnson, Paschal v. ..... 183 N. C., 129 ..... 246, 560
Johnson v. Pate ..... 95 N. C., 70 124
Johnson v. Patterson ..... 9 N. C., 183 849
Johnson v. Prairie ..... 91 N. C., 159 503
Johnson v. R. R. ..... 116 N. C., 926 527
Johnson v. R. R. ..... 163 N. C., 431 149
Johnson v. R. R. ..... 184 N. C., 104 697
Johnson, S. v. ..... 161 N. C., 264 589
Johnson, S. v. ..... 170 N. C., 690 490
Johnson, S. v. ..... 172 N. C., 925 39
Johnson v. Watts ..... 46 N. C., 228 31
Johnson v. Whilden ..... 166 N. C., 109 375
Johnson v. Whilden ..... 171 N. C., 157 376
Johnson v. Winslow ..... 63 N. C., 552 325
Johnston v. Rankin ..... 70 N. C., 555 ..... 203, 683
Jones, Benedict v. ..... 129 N. C., 470, 473 ..... 579, 614
Jones v. Boyd ..... 80 N. C., 258 131
Jones, Bunting v. ..... 78 N. C., 242 ..... 825, 826
Jones v. Comrs. of Madison ..... 137 N. C., 579 689
Jones v. Comrs. of Person ..... 107 N. C., 248, 265 ..... 132, 324
Jones v. Comrs. of Stokes ..... 143 N. C., 59 247
Jones, Coöperative Assn. v. ..... 185 N. C., 265
182, 261, 262, 341, 359, 368, 412
Jones, Johnson v. ..... 186 N. C., 234 262
Jones v. Jones ..... 80 N. C., 247 850
Jones v. Lassiter ..... 169 N. C., 750 132
Jones v. Parker ..... 97 N. C., 33 418
Jones, Powell v. ..... 36 N. C., 337 337
Jones, Rankin v. ..... 55 N. C., 169 821
Jones v. Richmond ..... 161 N. C., 553 424
Jones v. Sherrard ..... 22 N. C., 187 455
Jones v. Stanly ..... 76 N. C., 355 231
Jones, S. v. ..... 83 N. C., 605 96
Jones, S. v. ..... 139 N. C., 613 211
Jones, S. v. ..... 182 N. C., 781 531
Jones v. Williams ..... 155 N. C., 179 112
Jordan, Hendersonville v. ..... 150 N. C., 35 132
Journegan, S. v. ..... 185 N. C., 707 366
Joyner, Door Co. v. ..... 182 N. C., 520 603
Joyner, Stancill v. ..... 159 N. C., 617 411
Joyner, S. v. ..... 81 N. C., 534 325
Justice v. Asheville ..... 161 N. C., 62 769
Justice, Bank v. ..... 157 N. C., 375 527
Justices, Caldwell v. ..... 57 N. C., 323 324

K

Kearney v. Vann ..... 154 N. C., 311 672
Keith v. Scales ..... 124 N. C., 516 783
Kelly, Hunter v. ..... 92 N. C., 285 448
Kelly, Thomas v. ..... 46 N. C., 375 31
Kennedy, Buie v. ..... 164 N. C., 299 222

Kennedy v. Trust Co.....180 N. C., 225..... 398
Kennedy v. Williams ..... 87 N. C., 6..... 21
Kerchner v. McRae..... 80 N. C., 219..... 16
Kernodle v. Williams.....153 N. C., 475..... 16
Kerr v. Hicks.....154 N. C., 268..... 47
Kerr v. Sanders.....122 N. C., 635..... 211
Ketchey S. v..... 70 N. C., 621..... 116, 586
Kilburn, Mitchell v..... 74 N. C., 483..... 251
Kilgore, S. v..... 93 N. C., 533..... 587
Killian, S. v.....173 N. C., 792..... 491
Kimbrough v. Hines .....180 N. C., 285..... 354
Kimbrough v. R. R.....182 N. C., 234..... 354
Kincaid, S. v. .....183 N. C., 709..... 730
King, Christenbury v..... 85 N. C., 230..... 31
King v. Hobbs.....139 N. C., 170..... 579
King, McDaniel v..... 90 N. C., 602..... 508
Kinney v. R. R.....122 N. C., 964..... 293
Kinston v. R. R.....183 N. C., 14..... 111, 490
King v. R. R.....184 N. C., 442..... 185, 187, 188, 189
Kirby v. Boyette .....116 N. C., 167..... 815
Kirby, Weaver v.....186 N. C., 390..... 783
Kirkland v. Mangum..... 50 N. C., 313..... 327
Kirkman v. Wadsworth.....137 N. C., 453..... 602
Kirkpatrick, S. v.....179 N. C., 747..... 260
Klutts v. Klutts ..... 58 N. C., 80..... 826
Knight v. Houghtalling ..... 94 N. C., 408..... 746
Knight, Ins. Co. v.....160 N. C., 592..... 315
Kornegay v. Everett..... 99 N. C., 30..... 579
Kress, Strickland v. .....183 N. C., 536..... 503
Krout, S. v.....183 N. C., 804..... 850

L

LaBerge, Temple v.....184 N. C., 254..... 237
Lance, S. v.....166 N. C., 413..... 469
Lacy v. Bank .....183 N. C., 373..... 689
Lacy v. Packing Co. .....134 N. C., 567..... 620
Lamb v. Perry .....169 N. C., 444..... 581
Lambert, S. v. ..... 93 N. C., 618..... 586, 588
Lambeth, Jenkins v.....172 N. C., 468..... 816
Lancaster v. Ins. Co.....153 N. C., 285..... 101
Lance, S. v.....166 N. C., 413..... 469
Land Co., Makely v.....175 N. C., 101..... 139
Land Co. v. Murphy.....179 N. C., 133..... 21
Land Co., Phillips v.....174 N. C., 542..... 848
Land Co. v. Smith.....151 N. C., 70..... 620
Land Co. v. Wooten.....177 N. C., 250.....389, 441, 606
Lane v. Comrs. of Rowan.....139 N. C., 443..... 525
Lane v. Engineering Co..... 18 N. C., 307..... 828
Lane, S. v.....166 N. C., 333..... 8, 589, 723, 725
Laney, S. v..... 87 N. C., 535..... 663
Lanier, Baggett v.....178 N. C., 129..... 156
Lanier, Taylor v..... 7 N. C., 98..... 595
Lapish v. Director General.....182 N. C., 593..... 149, 153
Lassiter, Hodges v..... 96 N. C., 351..... 585, 719

Lassiter, Jones v. ....169 N. C., 750.... 132
Lassiter, Norwood v. ....132 N. C., 55.... 211
Latham v. Lumber Co. ....139 N. C., 9.... 378, 601
Latham v. Spragins ....162 N. C., 404.... 613
Lattimore, Quinn v. ....120 N. C., 426.... 132
Laughlin, Coltrane v. ....157 N. C., 282.... 747
Lawrence v. Eller ....169 N. C., 211.... 665
Laws, Cole v. ....104 N. C., 657.... 418
Lawson v. R. R. ....112 N. C., 400.... 738
Laxton v. Tilly ....66 N. C., 327.... 595
Lea v. Ins. Co. ....168 N. C., 478.... 39
Lea v. Johnson ....31 N. C., 19.... 628
Lea v. Utilities Co. ....175 N. C., 464.... 296
Leach, Moore v. ....50 N. C., 88.... 540
Ledbetter v. Pinner ....120 N. C., 455, 456, 458.... 496, 599, 747
Ledford v. Emerson ....138 N. C., 502.... 462
LeDuc v. Moore ....111 N. C., 516.... 518
Lee v. Baird ....146 N. C., 361.... 472
Lee, Barefoot v. ....168 N. C., 90.... 39
Lee, Boone v. ....175 N. C., 383.... 41
Lee v. Giles ....161 N. C., 541.... 822
Lee, Hoge v. ....184 N. C., 44, 50.... 654
Lee v. Thornton ....176 N. C., 208.... 746
Lee v. Waynesville ....184 N. C., 565.... 260
Leeper, S. v. ....146 N. C., 655.... 96
Lefkowitz v. Silver ....182 N. C., 339.... 41
Lehew v. Hewett ....138 N. C., 6.... 579
Lemon, Cline v. ....4 N. C., 323.... 326
Leonard, Lumber Co. v. ....145 N. C., 339.... 614
Lerch v. McKinne ....186 N. C., 244.... 372, 445, 447, 657
Lester v. Harward ....173 N. C., 83.... 163, 448
Lewis, Busbee v. ....85 N. C., 332.... 548
Lewis v. Murray ....177 N. C., 19, 21.... 221
Lewis, S. v. ....185 N. C., 643.... 94
Ligon v. Dunn ....28 N. C., 137.... 568
Lilliston, S. v. ....141 N. C., 857.... 662
Lilly, S. v. ....116 N. C., 1049.... 479
Lindsay, Black v. ....44 N. C., 467.... 448
Linville v. Nissen ....162 N. C., 95.... 352
Little, Gray v. ....127 N. C., 306.... 651
Little, S. v. ....178 N. C., 722.... 471
Little, Tripp v. ....186 N. C., 215.... 654
Loan Assn., Pringle v. ....182 N. C., 317.... 694
Loftin v. Hines ....107 N. C., 360.... 256
Loftin v. Loftin ....96 N. C., 95.... 579
Loftin, S. v. ....186 N. C., 205.... 656
Logan v. R. R. ....116 N. C., 940.... 186
Logging Co., Rector v. ....179 N. C., 62.... 212
Long v. Comrs. of Richmond ....76 N. C., 273.... 322
Long, Cunningham v. ....186 N. C., 526.... 41, 579
Long, Harding v. ....103 N. C., 1, 9.... 579, 581
Long, Hawkins v. ....74 N. C., 781.... 658
Long v. Ins. Co. ....114 N. C., 466.... 376
Long, Jenkins v. ....170 N. C., 269.... 811
Longmire v. Herndon ....72 N. C., 629.... 255

Loughran, Brewington v.....183 N. C., 558..... 358
Love, *In re*.....186 N. C., 714..... 119
Love, Jackson v..... 82 N. C., 405..... 777
Love v. McClure ..... 99 N. C., 290..... 826
Love, Morrisey v..... ..... 26 N. C., 38..... 220
Love, Rhyne v..... 98 N. C., 486..... 449
Love, Smith v. ..... 64 N. C., 439..... 578
Love, Ziegler v.....185 N. C., 42..... 540
Low, Smith v..... 24 N. C., 457..... 220
Lowder, Palmer v. .....167 N. C., 331..... 809
Lucas, Turlington v.....186 N. C., 286..... 367
Luken, Sanderlin v. .....152 N. C., 739..... 769
Lumber Co., Ainsley v.....165 N. C., 122..... 848
Lumber Co., Bunch v.....174 N. C., 8..... 212
Lumber Co. v. Childerhose.....167 N. C., 34..... 613
Lumber Co., Davis v.....130 N. C., 176..... 237
Lumber Co., Dunn v.....172 N. C., 129..... 848
Lumber Co., Fisher v.....183 N. C., 485, 489, 490.....17, 503, 530
Lumber Co., Griffin v.....140 N. C., 514..... 342
Lumber Co., Hemphill v.....141 N. C., 487, 488 .....294, 429, 430
Lumber Co., Hines v. .....174 N. C., 294..... 299
Lumber Co. v. Hudson.....153 N. C., 96..... 675
Lumber Co., Humphrey v.....174 N. C., 520..... 825
Lumber Co. v. Johnson .....177 N. C., 51..... 503
Lumber Co., Latham v.....139 N. C., 9..... 378, 601
Lumber Co. v. Leonard .....145 N. C., 339..... 614
Lumber Co. v. Lumber Co.....153 N. C., 50..... 595
Lumber Co., Miller v..... 66 N. C., 503..... 527
Lumber Co., Owen v. .....185 N. C., 612..... 861
Lumber Co., Patterson v.....175 N. C., 90, 92, 93.....597, 739, 740
Lumber Co., Powell v.....168 N. C., 635..... 503
Lumber Co., Shepherd v.....166 N. C., 130..... 849
Lumber Co., Smith v.....142 N. C., 26..... 709
Lumber Co., Stanley v.....184 N. C., 302, 306.....366, 473
Lumber Co., Taylor v.....173 N. C., 112, 116, 117..... 293, 296
Lumber Co. v. Triplett.....151 N. C., 409..... 654
Lumber Co., Weston v.....162 N. C., 165..... 748
Lumber Co., Wilson v.....186 N. C., 57..... 318
Lumberton, Thompson v.....182 N. C., 260..... 548
Lumpkins, Montague v.....178 N. C., 270..... 606
Lunn v. Shermer ..... 93 N. C., 169..... 197
Luther v. Luther .....157 N. C., 500..... 747
Luton v. Wilcox..... 83 N. C., 20..... 212
Lyle, S. v.....100 N. C., 497..... 203, 210
Lynch, Chesson v. .....186 N. C., 626..... 373
Lyon, Bragg v..... 93 N. C., 151..... 746
Lytton v. Mfg. Co.....157 N. C., 333..... 800

M

McAdams v. Trust Co.....167 N. C., 496..... 636
McAdden, S. v. ..... 71 N. C., 207..... 663
McAdoo v. R. R.....105 N. C., 140..... 148
McArtan, R. R. v. .....185 N. C., 201..... 324

McCallum v. McCallum .....167 N. C., 310..... 507
McCanless, S. v.....182 N. C., 843..... 722
McCausland v. Construction Co..172 N. C., 708..... 415
McCauless, S. v..... 31 N. C., 375..... 663
McCauley v. McCauley.....122 N. C., 289..... 746
McCless v. Meekins.....117 N. C., 34, 39 325
McClure, Love v. ..... 99 N. C., 290..... 826
McCormac, Alford v..... 90 N. C., 153..... 371
McCormac v. Comrs. of Robeson. 90 N. C., 441..... 247
McCormack, Ball v.....172 N. C., 682..... 39
McCulloch v. R. R.....149 N. C., 313, 317 740
McDaniel v. King..... 90 N. C., 602..... 508
McDaniel, Mills v.....161 N. C., 113..... 747
McDowell v. R. R.....186 N. C., 571, 579.....8, 9, 12, 294
McElwee v. Blackwell ..... 82 N. C., 345..... 832
McElwee, Mfg. Co. v..... 94 N. C., 425..... 360
McElwee, Tobacco Co. v..... 94 N. C., 425..... 411
McEwen, Bank v.....160 N. C., 416..... 476
McFarland, Burns v. .....146 N. C., 382..... 131, 255
McGee v. Craven .....106 N. C., 351..... 222
McGinnis v. Typo. Union.....182 N. C., 770, 771, 772, 773, 774....51, 52, 53
McGlammery, S. v. .....173 N. C., 750..... 473
McIntyre, Nimmocks v. .....120 N. C., 326..... 579
McIver v. McKinney.....184 N. C., 396..... 507
McIver, Robinson v..... 63 N. C., 645..... 784
McIver, S. v.....175 N. C., 761..... 609
McKeithen, Galloway v..... 27 N. C., 12..... 326
McKinne, Lerch v.....186 N. C., 244..... 372, 445, 447, 657
McKinney, McIver v.....184 N. C., 396..... 507
McLaughlin v. Mfg. Co.....103 N. C., 100..... 803
McLaurin, Norton v.....125 N. C., 187, 189.....390, 449
McLawhorn v. Harris.....156 N. C., 111..... 32
McLeary v. Norment..... 84 N. C., 235..... 116
McLeod v. Comrs. of Carthage..148 N. C., 77..... 672
McLeod v. Gooch.....162 N. C., 122..... 605
McMichael v. Hunt..... 83 N. C., 344..... 63, 64
McMillan v. Baker..... 85 N. C., 291..... 447, 448
McMillan v. Baker..... 92 N. C., 110..... 447, 448
McMillan v. R. R.....172 N. C., 853..... 39, 355
McNair v. Pope.....100 N. C., 404..... 41
McNair v. Yarboro.....186 N. C., 111, 113.....373, 448
McPhail, Weeks v.....128 N. C., 129..... 748
McPhail, Weeks v.....129 N. C., 73..... 748
McRae, Kerchner v..... 80 N. C., 219..... 16
McRae, S. v.....120 N. C., 608..... 492
McRae, S. v.....170 N. C., 712..... 704, 705
McWhirter v. McWhirter.....155 N. C., 145..... 41, 579
Mabry v. R. R. .....139 N. C., 388..... 186
Machine Co., Turner v.....133 N. C., 381..... 390
Mackie, Todd v.....160 N. C., 352..... 531
Maclin v. Smith..... 37 N. C., 376..... 139
Macon, Batchelor v..... 69 N. C., 545..... 424
Makely, Bd. of Education v.....139 N. C., 31, 38 656
Makely v. Land Co.....175 N. C., 101..... 139

Mallard, S. v. 184 N. C., 667 ... 584
Mangum, Harris v. 183 N. C., 235 ... 294
Mangum, Kirkland v. 50 N. C., 313 ... 327
Manly v. Abernathy 167 N. C., 220 ... 672
Mann v. Archbell 186 N. C., 74 ... 832
Mann v. Hall 163 N. C., 51, 54 ... 390, 420, 445
Manuel, S. v. 20 N. C., 146 ... 480
Mfg. Co. v. Andrews 165 N. C., 285, 294 ... 415, 466, 634
Mfg. Co., Bank v. 186 N. C., 744 ... 240
Mfg. Co., Bond v. 140 N. C., 381 ... 116
Mfg. Co., Bradley v. 177 N. C., 155 ... 39
Mfg. Co. v. Building Co. 177 N. C., 106 ... 39
Mfg. Co., Butler v. 182 N. C., 547 ... 25, 483
Mfg. Co., Cook v. 182 N. C., 205 ... 848
Mfg. Co. v. Davis 147 N. C., 267 ... 503
Mfg. Co., Lytton v. 157 N. C., 333 ... 800
Mfg. Co. v. McElwee 94 N. C., 425 ... 360
Mfg. Co., McLaughlin v. 103 N. C., 100 ... 803
Mfg. Co., Page v. 180 N. C., 330, 334 ... 9
Mfg. Co. v. R. R. 149 N. C., 261 ... 143, 173, 174
Mfg. Co., Roberts v. 181 N. C., 204 ... 774
Mfg. Co., Snipes v. 152 N. C., 44, 46, 47 ... 151
Mfg. Co., Tatham v. 180 N. C., 627 ... 847
Mfg. Co., Williams v. 175 N. C., 226 ... 430
Mfg. Co., Williams v. 177 N. C., 515 ... 241
March v. Harrell 46 N. C., 329 ... 849
Marion v. Tilley 119 N. C., 173 ... 390
Markley, Wilson v. 133 N. C., 616 ... 326
Marks, Dunn v. 141 N. C., 232 ... 446
Marrow v. Marrow 45 N. C., 148 ... 139
Marsh v. Marsh 48 N. C., 78 ... 119
Marshall v. Comrs. of Stanly 89 N. C., 103 ... 52
Marshall v. Flinn 49 N. C., 199 ... 5
Martin, *In re* 185 N. C., 472 ... 570, 844
Martin, S. v. 173 N. C., 808, 810 ... 39, 700
Martin, Twitty v. 90 N. C., 643 ... 784
Mason, Chewning v. 158 N. C., 578, 579 ... 139, 507
Mason v. Cotton Co. 148 N. C., 492 ... 145, 613
Mason v. R. R. 111 N. C., 482 ... 300
Mason v. White 53 N. C., 421 ... 378
Massey, S. v. 86 N. C., 658 ... 855
Masten, Thornburg v. 86 N. C., 293 ... 221
Mateer, Donnell v. 40 N. C., 7 ... 64
Mateer, Donnell v. 42 N. C., 94 ... 746
Matthews, Biggers v. 147 N. C., 300 ... 231
Maultsby, Burr v. 99 N. C., 263 ... 636
Mauney v. Coit 80 N. C., 300 ... 568
Mauney v. Coit 86 N. C., 471 ... 568
Mauney v. Gidney 88 N. C., 200, 202, 203 ... 390, 605, 606
May, Sprunt v. 156 N. C., 388 ... 527
May, Williams v. 173 N. C., 78 ... 799
Maynard v. Ins. Co. 132 N. C., 711 ... 532
Maynard, S. v. 184 N. C., 653 ... 588
Mayo v. Whitson 47 N. C., 321 ... 327

Meadows, Duffy v. 131 N. C., 31 ... 251
Means, *In re* 176 N. C., 307, 311 ... 515
Mebane v. Mebane 39 N. C., 131 ... 63
Mecke v. Mineral Co. 122 N. C., 790, 797 ... 597
Meekins, McCless v. 117 N. C., 34, 39 ... 325
Melton, S. v. 166 N. C., 442 ... 24
Mendenhall v. Mendenhall 53 N. C., 287 ... 211
Mercer, Hood v. 150 N. C., 699 ... 474
Meredith, Gervin v. 4 N. C., 439 ... 654
Meroney, Cherokee County v. 173 N. C., 653 ... 810
Meroney, Moore v. 154 N. C., 158 ... 21
Merrick, S. v. 171 N. C., 788, 795 ... 25, 589
Merrick, S. v. 172 N. C., 872 ... 39
Mesic v. R. R. 120 N. C., 490 ... 353
Millard, Pearson v. 150 N. C., 311 ... 219
Miller v. Bank 176 N. C., 152 ... 864
Miller, Britton v. 63 N. C., 270 ... 378
Miller, Drum v. 135 N. C., 215 ... 295
Miller, Parlier v. 186 N. C., 501 ... 112, 367
Miller v. Lumber Co. 66 N. C., 503 ... 527
Miller, Rippey v. 46 N. C., 479 ... 483
Miller v. Smith 169 N. C., 210 ... 606
Miller, S. v. 97 N. C., 487 ... 728
Milliken v. Denny 141 N. C., 224 ... 19, 21
Mills v. McDaniel 161 N. C., 113 ... 747
Mills, S. v. 91 N. C., 594 ... 847
Mills, Thompson v. 39 N. C., 390 ... 255
Mills, Walton v. 86 N. C., 280 ... 803
Mills v. Williams 33 N. C., 558 ... 247
Mims, Crump v. 64 N. C., 767 ... 21
Mimms v. R. R. 183 N. C., 436 ... 702
Mineral Co., Mecke v. 122 N. C., 790, 797 ... 597
Mining Co., Bruce v. 147 N. C., 642 ... 634
Mining Co., Currie v. 157 N. C., 218, 220 ... 371, 606
Mining Co., Dorsey v. 177 N. C., 60 ... 448
Mining Co., Neaves v. 90 N. C., 412 ... 761
Mining Co., Stockton v. 144 N. C., 595 ... 605
Minton v. Early 183 N. C., 200 ... 704, 705
Minton v. Hughes 158 N. C., 586 ... 390
Misenheimer, Hall v. 137 N. C., 186 ... 761
Mitchell v. Electric Co. 129 N. C., 169 ... 837
Mitchell, Haggard v. 180 N. C., 255 ... 21
Mitchell v. Kilburn 74 N. C., 483 ... 251
Mitchell v. Mitchell 122 N. C., 332 ... 418
Mitchell v. R. R. 124 N. C., 236 ... 177
Mitchell v. Talley 182 N. C., 683, 688 ... 376, 532
Mode v. Penland 93 N. C., 292 ... 821
Modlin v. Ins. Co. 151 N. C., 35 ... 102
Modlin v. Simmons 183 N. C., 65 ... 839
Monot, Evans v. 57 N. C., 227, 228 ... 277, 283
Montague v. Lumpkins 178 N. C., 270 ... 606
Montgomery, S. v. 183 N. C., 747 ... 730
Monument Co., Moore v. 166 N. C., 211 ... 413
Moore v. Askew 85 N. C., 199 ... 338

Moore v. Byers..... 65 N. C., 240..... 825
Moore, Cureton v..... 55 N. C., 207..... 628
Moore, Gooding v.....150 N. C., 195..... 17
Moore v. Guano Co.....130 N. C., 229..... 584
Moore v. Ivey..... 43 N. C., 193..... 579
Moore v. Leach..... 50 N. C., 88..... 540
Moore, LeDuc v.....111 N. C., 516..... 518
Moore v. Meroney.....154 N. C., 158..... 21
Moore v. Monument Co.....166 N. C., 211..... 413
Moore v. R. R.....179 N. C., 637..... 175
Moore, Shaw v..... 49 N. C., 25..... 586
Moore, Smith v.....178 N. C., 374..... 537
Moore, S. v.....111 N. C., 672..... 198
Moore, S. v.....120 N. C., 570..... 584
Moore, Summers v.....113 N. C., 394..... 579
Moose v. Comrs. of Alexander..172 N. C., 419, 428..... 324
Moran v. Comrs. of Chowan.....168 N. C., 289..... 325
Morehead, Craycroff v..... 67 N. C., 422..... 132
Morehead, Smith v..... 59 N. C., 364..... 843
Morgan v. Benefit Society.....167 N. C., 266..... 503
Morgan, Puckett v.....158 N. C., 344..... 537
Moring v. Dickerson..... 85 N. C., 466..... 825
Morris, *In re*.....138 N. C., 262..... 267
Morris v. Osborne.....104 N. C., 612..... 116
Morris, S. v..... 84 N. C., 756..... 699
Morris, S. v.....104 N. C., 837..... 805
Morrisett v. Stevens.....136 N. C., 160..... 536
Morrisey v. Love..... 26 N. C., 38..... 220
Morrison, S. v..... 14 N. C., 299..... 573
Morrison, S. v.....126 N. C.,1123..... 28
Morrison v. Walker.....179 N. C., 587..... 358
Morrow v. R. R.....147 N. C., 623..... 150
Morrow, Stroud v..... 52 N. C., 463..... 139, 140
Morton, Hudson v.....162 N. C., 6..... 448
Moser, Real Estate Co. v.....175 N. C., 259..... 25, 483
Motor Co., Muse v.....175 N. C., 471..... 39
Motors Co., Erskine v.....185 N. C., 486..... 829
Mott v. Ramsey..... 92 N. C., 152..... 335
Mt. Airy, Fawcett v.....134 N. C., 125..... 490
Mueller's Will, *In re*.....170 N. C., 30..... 383
Mull, Brittain v..... 91 N. C., 499..... 747
Mull v. R. R.....175 N. C., 593..... 652
Munroe v. Stutts..... 31 N. C., 49..... 503
Murphrey, S. v.....186 N. C., 113..... 716
Murphrey, S. v.....186 N. C., 113..... 656, 716
Murphy, Campbell v..... 55 N. C., 357..... 824
Murphy, Land Co. v.....179 N. C., 133..... 21
Murphy, Withrell v.....154 N. C., 89..... 494
Murray v. Bass.....184 N. C., 318..... 605
Murray, Lewis v.....177 N. C., 19, 21..... 221
Muse v. Motor Co.....175 N. C., 471..... 39
Musselwhite, Barefoot v.....153 N. C., 208..... 210
Myatt v. Myatt.....149 N. C., 137..... 5
Myers v. R. R.....171 N. C., 190..... 145

N

Nance v. Tel. Co.....177 N. C., 315..... 473
Nat, S. v..... 51 N. C., 114..... 469
Neal v. R. R.....126 N. C., 634..... 148
Neal, Reid v.....182 N. C., 199..... 784
Neaves v. Mining Co..... 90 N. C., 412..... 761
Nelson v. Ins. Co.....120 N. C., 302..... 527
Nelson v. Relief Department.....147 N. C., 104..... 47
Neville, S. v.....175 N. C., 731, 735.....24, 722
New Bern, Fisher v.....140 N. C., 512..... 295
Newman, Ellett v. ..... 92 N. C., 519..... 262
Newsom, Stafford v..... 31 N. C., 510..... 198
Newsom, S. v..... 27 N. C., 250..... 202
Newsome v. Earnhart ..... 86 N. C., 391..... 132
Newsome, Foil v.....138 N. C., 115, 123 815
Newsome v. Thompson..... 24 N. C., 277..... 757
Newton, Everett v.....118 N. C., 919..... 816
Newton v. School Committee.....158 N. C., 187..... 495
Nichols v. Gladden.....117 N. C., 497..... 537
Nichols, Nicholson v.....115 N. C., 200..... 634
Nicholson, Bruce v.....109 N. C., 202..... 474
Nicholson, DeBerry v.....102 N. C., 465..... 132
Nicholson v. Nichols.....115 N. C., 200..... 634
Nimmocks v. McIntyre.....120 N. C., 326..... 579
Nissen, Linville v.....162 N. C., 95..... 352
Norfleet v. Cotton Factory.....172 N. C., 833..... 466
Norfleet v. Ins. Co.....160 N. C., 327..... 821
Norman v. Hallsey.....132 N. C., 6..... 112
Norman, Wilkins v.....139 N. C., 39.....692, 756
Norment, McLeary v..... 84 N. C., 235..... 116
Norris v. Durfey.....168 N. C., 321..... 267
Norris, James v..... 57 N. C., 225..... 257
Norris v. R. R.....152 N. C., 512..... 150
Norton v. McLaurin.....125 N. C., 187, 189.....390, 449
Norton v. Smith.....179 N. C., 553.....220, 222
Norwood v. Lassiter .....132 N. C., 55..... 211
Norwood, S. v.....115 N. C., 789..... 470
Nowell v. Basnight.....185 N. C., 148..... 293

O

Oates, Rankin v.....183 N. C., 517, 520.....501, 776
Oates, Ryder v.....173 N. C., 569..... 747
Ober v. Smith..... 73 N. C., 313.....173, 345
Odeneal, Wade v..... 14 N. C., 423..... 326
Ogburn, Trust Co. v.....181 N. C., 324..... 784
Oil Co., Bullock v.....165 N. C., 67..... 75
Oil Co., Star v.....165 N. C., 587..... 800
Oil Mills, Bank v.....150 N. C., 683..... 586
Oldham v. Oldham..... 58 N. C., 89..... 6
Oliphant v. R. R.....171 N. C., 303.....586, 587
Orr, Glenn v..... 96 N. C., 413..... 335
Osborne v. Durham.....157 N. C., 262..... 527
Osborne, Morris v.....104 N. C., 612..... 116

Osborne v. R. R.....160 N. C., 309..... 353
Outland v. Outland.....118 N. C., 139..... 595
Overall Co. v. Hollister Co.....186 N. C., 208..... 422
Overall Co. v. Holmes.....186 N. C., 428, 431, 434.....111, 701, 746
Overcash v. Electric Co.....144 N. C., 572, 582 9
Overton v. Hinton.....123 N. C., 1..... 826
Owen, Greene v.....125 N. C., 212, 222 325
Owen v. Lumber Co.....185 N. C., 612..... 861
Owens v. Wright.....161 N. C., 127..... 344
Ozment, Warehouse Co. v.....132 N. C., 839..... 579

P

Pace v. Pace..... 73 N. C., 118..... 63, 64
Packing Co. v. Davis.....118 N. C., 548..... 237
Packing Co., Lacy v.....134 N. C., 567..... 620
Padgett, Whitehurst v.....157 N. C., 424..... 394
Page v. Mfg. Co.....180 N. C., 330, 334 9
Palmer v. Lowder.....167 N. C., 331..... 809
Palmer's Will, *In re*.....117 N. C., 134..... 179
Paper Co. v. Chronicle.....115 N. C., 149..... 832
Parker, Cromartie v.....121 N. C., 198..... 774
Parker, Howell v.....136 N. C., 373..... 826
Parker, Jones v..... 97 N. C., 33..... 418
Parker v. R. R.....181 N. C., 103..... 351, 353
Parker, S. v.....132 N. C.,1015..... 584
Parks v. Comrs. of Lenoir.....186 N. C., 498, 499, 490..52, 203, 204, 210, 683
Parks v. Express Co.....185 N. C., 428..... 279
Parks v. Robinson.....138 N. C., 269..... 139
Parlier v. Miller.....186 N. C., 501..... 112, 369
Parvin v. Comrs. of Beaufort....177 N. C., 508..... 323, 324
Paschal v. Johnson.....183 N. C., 129..... 246, 560
Pate, Johnson v..... 95 N. C., 70..... 124
Patterson, Johnson v..... 9 N. C., 183..... 849
Patterson v. Lumber Co.....175 N. C., 90, 92, 93.....597, 739, 740
Patterson, Roanoke Rapids v.....184 N. C., 135, 137.....575, 844
Patterson v. Wilson.....101 N. C., 586..... 507
Patton v. Brittain..... 32 N. C., 8..... 527
Paul v. R. R.....170 N. C., 231..... 295
Paul v. Washington.....134 N. C., 364..... 548
Payne, Chambers v..... 59 N. C., 277..... 378
Payne, Comrs. of Buncombe v....123 N. C., 432, 490 798
Peace, Raleigh v.....110 N. C., 32, 38 769
Peanut Co., Blanchard v.....180 N. C., 23..... 658
Peanut Co. v. R. R.....155 N. C., 152..... 697
Pearce, Allen v..... 59 N. C., 309..... 255
Pearce, Creecy v..... 69 N. C., 67..... 824, 825
Pearce, Gwathmey v..... 74 N. C., 398..... 824, 825
Pearce, Smiley v..... 98 N. C., 185..... 848
Pearson v. Millard.....150 N. C., 311..... 219
Pearson, S. v.....181 N. C., 588..... 24
Pearson, Walton v..... 85 N. C., 35, 48 327
Peck, Holland v..... 37 N. C., 255..... 783, 784
Peebles v. Graham.....128 N. C., 225..... 507
Peele v. Powell.....156 N. C., 553..... 394

Pierce, School v. 163 N. C., 424 ... 131
Pendleton v. Williams 175 N. C., 252 ... 75
Penland, Mode v. 93 N. C., 292 ... 821
Penniman v. Alexander 111 N. C., 427 ... 16
Penniman v. Winder 180 N. C., 73 ... 346
Pennington v. Tarboro 184 N. C., 71 ... 156
Penny, Barbee v. 174 N. C., 571 ... 251
Penny, Brite v. 157 N. C., 112, 114 ... 518, 614
Peoples, S. v. 131 N. C., 788 ... 586
Perdue v. Perdue 124 N. C., 163 ... 595
Perry v. Adams 98 N. C., 167 ... 398
Perry v. Comrs. of Bladen 183 N. C., 387, 392 ... 133, 246, 559, 560, 772
Perry, Lamb v. 169 N. C., 444 ... 581
Perry v. Perry 172 N. C., 63 ... 125
Perry v. R. R. 180 N. C., 290, 298 ... 150, 646
Perry, S. v. 44 N. C., 330 ... 584, 586
Perry v. Swanner 150 N. C., 141 ... 466
Person v. Doughton 186 N. C., 723 ... 203, 280, 283, 287
Person v. Watts 184 N. C., 499, 508, 516, 517, 538, 541— 275, 279, 280, 283, 286, 287, 288
Peters v. Highway Com. 184 N. C., 30, 32 ... 131, 132
Pettaway, Harvey v. 156 N. C., 375 ... 714
Petty v. Rosseau 94 N. C., 362 ... 418
Phifer v. Comrs. of Cabarrus 157 N. C., 150 ... 37
Phifer v. Ins. Co. 123 N. C., 405, 409 ... 420, 445
Phillips v. Land Co. 174 N. C., 542 ... 848
Phillips, S. v. 185 N. C., 620 ... 611
Phillipse v. Higdon 44 N. C., 380 ... 327
Pickler v. Board of Education 149 N. C., 221 ... 413
Pigford, S. v. 117 N. C., 748 ... 479
Pinnell v. Burroughs 172 N. C., 182 ... 816
Pinner, Ledbetter v. 120 N. C., 455, 456, 458 ... 496, 599, 747
Pitchford, Dick v. 21 N. C., 480 ... 63
Pleasant, Bridges v. 480 N. C., 26 ... 783
Plummer v. Baskerville 36 N. C., 252 ... 579
Plummer v. Brandon 40 N. C., 192 ... 842
Polk, Wilson v. 175 N. C., 490 ... 352
Pollard v. Slaughter 92 N. C., 72 ... 823
Pollock v. Warwick 104 N. C., 638 ... 579
Pollok, S. v. 26 N. C., 305 ... 663
Pope, Braswell v. 82 N. C., 57 ... 16
Pope, McNair v. 100 N. C., 404 ... 41
Pope v. Pope 176 N. C., 287 ... 463
Pope, Ricks v. 129 N. C., 55 ... 595
Pope, Taylor v. 106 N. C., 267 ... 447
Pope, Thompson v. 183 N. C., 124 ... 593
Porter v. Armstrong 132 N. C., 66 ... 132
Porter v. Armstrong 134 N. C., 447 ... 496
Porter v. R. R. 97 N. C., 66 ... 831, 832
Porter v. White 128 N. C., 42 ... 579
Poston v. Gillespie 58 N. C., 258 ... 5
Potts, S. v. 100 N. C., 457 ... 586
Powell v. Jones 36 N. C., 337 ... 337
Powell v. Lumber Co. 168 N. C., 635 ... 503

Powell, Peele v. ....156 N. C., 553.... 394
Powell v. Powell....168 N. C., 561.... 757
Powell v. R. R....125 N. C., 371.... 177
Powell, S. v.... 94 N. C., 965.... 587
Powell, S. v....100 N. C., 525.... 620
Power Co., Goodman v. ....174 N. C., 661.... 430
Power Co., Ingram v. ....181 N. C., 359.... 251
Power Co. v. Power Co....171 N. C., 248.... 832
Power Co., Pruitt v. ....165 N. C., 420.... 738
Power Co., Turner v. ....154 N. C., 131, 137....837, 838
Prairie, Johnson v.... 91 N. C., 159.... 503
Pringle v. Loan Assn....182 N. C., 317.... 694
Pritchard v. Dailey....168 N. C., 332.... 197, 342
Pritchard v. Sanderson.... 84 N. C., 299.... 629
Proctor v. Comrs. of Nash....182 N. C., 59.... 204
Proctor v. Fertilizer Works....183 N. C., 153.... 262
Propst v. Caldwell....172 N. C., 594.... 748
Pruitt v. Power Co....165 N. C., 420.... 738
Public Service Co., Shaw v....168 N. C., 611, 617.... 837
Publishing Co. v. Barber....165 N. C., 478, 486.... 398
Puckett v. Morgan....158 N. C., 344.... 537
Pugh v. Wheeler.... 19 N. C., 50.... 803
Pullen v. Comrs. of Wake.... 66 N. C., 363.... 267
Pullen v. Corporation Com....152 N. C., 548, 553....281, 672
Purcell v. R. R....119 N. C., 739.... 418
Purnell v. Daniel.... 43 N. C., 9.... 411
Pusey v. R. R....181 N. C., 137, 142....352, 355

Q

Quarries Co., Smith v....164 N. C., 338.... 740
Quelch v. Futch....172 N. C., 316.... 156
Quinn v. Lattimore....120 N. C., 426.... 132

R

Rabon v. R. R....149 N. C., 59.... 462
Rackley v. Roberts....147 N. C., 201.... 209
Ragland S. v. .... 75 N. C., 12.... 586
R. R., Adams v. ....110 N. C., 326.... 803
R. R., Adams v. ....125 N. C., 565.... 556
R. R., Allen v. ....120 N. C., 550.... 82
R. R., Arrowood v. ....126 N. C., 632.... 700
R. R., Aycock v. .... 89 N. C., 321.... 186
R. R., Aydlett v. ....172 N. C., 47, 49.... 143, 172, 174
R. R., Bagwell v. ....167 N. C., 611.... 353, 355
R. R., Baker v. ....144 N. C., 37, 43.... 352, 355, 356
R. R., Beach v. ....148 N. C., 153.... 148
R. R., Belshe v. ....186 N. C., 246.... 300
R. R., Boney v. ....155 N. C., 95.... 85
R. R., Box Factory v. ....148 N. C., 421.... 174
R. R., Bristol v. ....175 N. C., 510.... 82
R. R., Bryson v. ....141 N. C., 594.... 597
R. R., Buggy Corp. v. ....152 N. C., 119, 120, 122 ....143, 172, 173, 174
R. R., Bullock v. ....105 N. C., 180.... 151, 152

R. R., Burns v. ....125 N. C., 306.... 651
R. R., Campbell v. ....159 N. C., 586.... 155
R. R., Cardwell v. ....146 N. C., 219.... 174
R. R., Carlton v. ....104 N. C., 365.... 152
R. R., Caveness v. ....172 N. C., 305.... 156
R. R. v. Cherokee County....177 N. C., 86.... 323
R. R., Clark v. ....109 N. C., 443, 444.... 151
R. R. v. Comrs. of Alamance..... 91 N. C., 454.... 287
R. R. v. Comrs. of Bladen....178 N. C., 449.... 323
R. R. v. Comrs. of Mecklenburg148 N. C., 220, 240.... 324
R. R. v. Comrs. of Wake..... 87 N. C., 426.... 272
R. R., Conley v. ....109 N. C., 692.... 82
R. R., Cooper v. ....140 N. C., 209.... 149
R. R., Corporation Com. v....170 N. C., 560.... 496
R. R., Cox v. ....123 N. C., 604, 611.... 656
R. R., Cox v. ....126 N. C., 105.... 700
R. R., Cox v. ....149 N. C., 87.... 418
R. R., Cox v. ....149 N. C., 117.... 9
R. R., Daniel v. ....136 N. C., 517.... 503
R. R., Daniels v. ....158 N. C., 428.... 652
R. R. v. Davis..... 19 N. C., 451.... 742
R. R., Davis v. ....147 N. C., 68.... 174
R. R., Deans v. ....107 N. C., 686.... 152
R. R., Dudley v. ....180 N. C., 34, 36....641, 647, 648, 649
R. R., Durham v. ....113 N. C., 240.... 864
R. R., Duval v. ....134 N. C., 331, 334....351, 352, 355
R. R., Edwards v. ....129 N. C., 79.... 350, 353
R. R., Efland v. ....146 N. C., 139.... 535
R. R., Ellington v. ....170 N. C., 36.... 173
R. R., Elliott v. ....155 N. C., 236.... 174
R. R., Ellis v. ..... 24 N. C., 138.... 850
R. R. v. Ely ..... 95 N. C., 77.... 210
R. R., Evans v. ..... 96 N. C., 47.... 131
R. R., Exum v. ....154 N. C., 413.... 148, 151
R. R., Ferebee v. ....167 N. C., 296.... 39
R. R., Fitzgerald v. ....141 N. C., 530.... 837
R. R., Fleming v. ....131 N. C., 476.... 299
R. R., Fleming v. ....160 N. C., 196.... 83
R. R., Futch v. ....178 N. C., 284.... 39
R. R., Gaskins v. ....151 N. C., 19.... 143
R. R., Goff v. ....179 N. C., 216..... 119, 121, 150, 350, 353, 646
R. R., Greenlee v. ....122 N. C., 977.... 299, 648
R. R. v. Goldsboro....155 N. C., 359, 363.... 642
R. R., Gwyn v. ..... 85 N. C., 430.... 173, 174
R. R., Harris v. ....153 N. C., 542.... 803
R. R., Haynes v. ....143 N. C., 154.... 300
R. R., High v. ....112 N. C., 385.... 148
R. R., Hill v. ....178 N. C., 612.... 251
R. R., Hinkle v. ....109 N. C., 472.... 646
R. R., Holmes v. ....186 N. C., 63.... 162
R. R., Horne v. ....170 N. C., 660.... 153
R. R., Hornthal v. ....167 N. C., 627.... 848
R. R., Horton v. ....175 N. C., 472, 488....175, 176
R. R., Hospital v. ....157 N. C., 460.... 189

R. R., Hough v. ....144 N. C., 700, 702 739
R. R., Howard v. ....122 N. C., 944.... 597, 739
R. R., Hunt v. ....170 N. C., 442.... 351
R. R., Hyder v. ....167 N. C., 584.... 597
R. R., Jackson v. ....181 N. C., 153.... 646
R. R., Jeffress v. ....158 N. C., 215.... 37
R. R., Jenkins v. ....155 N. C., 203.... 646
R. R., Johnson v. ....116 N. C., 926.... 527
R. R., Johnson v. ....163 N. C., 431.... 149
R. R., Johnson v. ....184 N. C., 104.... 697
R. R., Kimbrough v. ....182 N. C., 234.... 354
R. R., King v. ....184 N. C., 442.... 185, 187, 188, 189
R. R., Kinney v. ....122 N. C., 964.... 293
R. R., Kinston v. ....183 N. C., 14.... 111, 490
R. R., Lawson v. ....112 N. C., 400.... 738
R. R., Logan v. ....116 N. C., 940.... 186
R. R., Mabry v. ....139 N. C., 388.... 186
R. R., McAdoo v. ....105 N. C., 140.... 148
R. R. v. McArtan....185 N. C., 201.... 324
R. R., McCulloch v. ....149 N. C., 313, 317 740
R. R., McDowell v. ....186 N. C., 571, 579....8, 9, 12, 294
R. R., McMillan v. ....172 N. C., 853.... 39, 355
R. R., Mfg. Co. v. ....149 N. C., 261, 143....173, 174
R. R., Mason v. ....111 N. C., 482.... 300
R. R., Mesic v. ....120 N. C., 490.... 353
R. R., Mimms v. ....183 N. C., 436.... 702
R. R., Mitchell v. ....124 N. C., 236.... 177
R. R., Moore v. ....179 N. C., 637.... 175
R. R., Morrow v. ....147 N. C., 623.... 150
R. R., Mull v. ....175 N. C., 593.... 652
R. R., Myers v. ....171 N. C., 190.... 145
R. R., Neal v. ....126 N. C., 634.... 148
R. R., Norris v. ....152 N. C., 512.... 150
R. R., Oliphant v. ....171 N. C., 303.... 586, 587
R. R., Osborne v. ....160 N. C., 309.... 353
R. R., Parker v. ....181 N. C., 103.... 351, 353
R. R., Paul v. ....170 N. C., 231.... 295
R. R., Peanut Co. v. ....155 N. C., 152.... 697
R. R., Perry v. ....180 N. C., 290, 298....150, 646
R. R., Porter v. .... 97 N. C., 66.... 831, 832
R. R., Powell v. ....125 N. C., 371.... 177
R. R., Purcell v. ....119 N. C., 739.... 418
R. R., Pusey v. ....181 N. C., 137, 142....352, 355
R. R., Rabon v. ....149 N. C., 59.... 462
R. R. v. R. R....147 N. C., 368.... 530
R. R. v. R. R....148 N. C., 64.... 258
R. R. v. R. R....157 N. C., 369.... 294
R. R., Ramsbottom v. ....138 N. C., 41.... 292, 295, 697, 808
R. R., Richardson v. ....126 N. C., 100.... 231
R. R., Robertson v. ....148 N. C., 323.... 174
R. R., Rogers v. ....186 N. C., 86.... 162
R. R., Rollins v. ....146 N. C., 153.... 174
R. R., Russell v. ....118 N. C., 1111.... 293
R. R., Saunders v. ....185 N. C., 289, 290....294, 850
R. R., Sawyer v. ....145 N. C., 24, 27 151

R. R., Sears v. ....178 N. C., 287.... 196
R. R., Shepard v. ....166 N. C., 544.... 646
R. R., Sherrill v. ....140 N. C., 252.... 150
R. R., Sloan v. ....126 N. C., 490.... 219
R. R., Snowden v. .... 95 N. C., 93.... 152
R. R., Springs v. ....130 N. C., 198.... 739
R. R., S. v. ....145 N. C., 495, 499 .... 21, 416, 548
R. R., Staton v. ....144 N. C., 135.... 740
R. R., Stewart v. ....137 N. C., 690.... 292, 294
R. R., Stone v. ....144 N. C., 220....143, 173, 174
R. R., Summers v. ....138 N. C., 295.... 174
R. R., Talley v. ....163 N. C., 581.... 150
R. R., Terry v. .... 91 N. C., 236.... 809
R. R., Trading Co. v. ....178 N. C., 175.... 174
R. R., Troxler v. ....124 N. C., 189.... 648
R. R., Walker v. ....135 N. C., 738.... 299
R. R., Ward v. ....161 N. C., 184, 186....295, 300
R. R., Ward v. ....167 N. C., 148.... 148
R. R., Watts v. ....183 N. C., 12.... 346
R. R., West v. ....140 N. C., 620.... 474
R. R., Williams v. ....182 N. C., 267, 273 847
R. R., Wilson v. .... 90 N. C., 69.... 152
R. R., Worth v. .... 89 N. C., 291.... 281
R. R., Wright v. ....127 N. C., 229.... 294
R. R., Wright v. ....155 N. C., 329.... 153
R. R., Wyne v. ....182 N. C., 253.... 150
R. R., Wyrick v. ....172 N. C., 549.... 148
Raleigh v. Peace ....110 N. C., 32, 38 769
Ramsbottom v. R. R....138 N. C., 41.... 292, 295, 697, 808
Ramsey, Davis v. .... 50 N. C., 236.... 20
Ramsey, Mott v. .... 92 N. C., 152.... 335
Rankin, Johnston v. .... 70 N. C., 555.... 203, 683
Rankin v. Jones .... 55 N. C., 169.... 821
Rankin v. Oates ....183 N. C., 517, 520....501, 776
Rawlings' Will, *In re*....170 N. C., 61.... 115
Rawls, Harrington v. ....131 N. C., 39.... 52
Rawls, Rhea v. ....131 N. C., 453.... 826
Ray, Rutherford v. ....147 N. C., 253.... 209
Ray, S. v. .... 32 N. C., 29.... 663
Real Estate Co. v. Moser....175 N. C., 259.... 25, 483
Realty Co., Chatham v....174 N. C., 671.... 232
Realty Co. v. Rumbough....172 N. C., 747.... 503
Realty Co., White v....182 N. C., 536.... 355
Reams, S. v. ....121 N. C., 556.... 479
Rector v. Logging Co....179 N. C., 62.... 212
Rector v. Rector....186 N. C., 618, 620....124, 843
Redmond v. Comrs. of Rutherford.... 87 N. C., 122.... 272
Reeves v. Davis .... 80 N. C., 209.... 335
Reeves v. Reeves .... 16 N. C., 386.... 507
Register, S. v. ....133 N. C., 746.... 728
Register Co. v. Hill....136 N. C., 277.... 709
Reid v. Neal ....182 N. C., 199.... 784
Reitz, S. v. .... 83 N. C., 634.... 699
Relief Department, Nelson v....147 N. C., 104.... 47

Reynolds v. Cotton Mills.....177 N. C., 412.....570, 575, 844
Reynolds, Warlick v. .....151 N. C., 606..... 376
Rhea v. Rawls .....131 N. C., 453..... 826
Rhyne v. Love ..... 98 N. C., 486..... 449
Rhyne v. Rhyne .....151 N. C., 400..... 530
Rich, Henry v. ..... 64 N. C., 379..... 832
Richardson v. R. R.....126 N. C., 100..... 231
Richardson v. Woodruff.....178 N. C., 46..... 346
Richmond, Jones v. .....161 N. C., 553..... 424
Ricks v. Pope .....129 N. C., 55..... 595
Riddle, College v. .....165 N. C., 211..... 625
Riggs v. Roberts ..... 85 N. C., 152..... 522, 523
Riggsbee v. Durham ..... 98 N. C., 81..... 132
Riggsbee, Durham v. .....141 N. C., 132..... 742
Riley v. Buchanan ..... 60 N. C., 479..... 424
Riley, S. v. .....113 N. C., 651..... 716
Ring, Brewer v. .....177 N. C., 476..... 82
Rippey v. Miller ..... 46 N. C., 479..... 483
Ritter, Blue v. .....118 N. C., 580..... 507
Rix, Ellison v. ..... 85 N. C., 80..... 567
Roanoke Rapids v. Patterson.....184 N. C., 135, 137.....575, 844
Robbins, Terry v. .....128 N. C., 142..... 568
Roberts v. Baldwin .....155 N. C., 276..... 832
Roberts v. Calvert ..... 98 N. C., 581..... 132
Roberts v. Dale .....171 N. C., 466..... 745
Roberts v. Mfg. Co.....181 N. C., 204..... 774
Roberts, Rackley v. .....147 N. C., 201..... 209
Roberts, Riggs v. ..... 85 N. C., 152..... 522, 523
Roberts v. Roberts ..... 82 N. C., 30..... 850
Robertson v. Aldridge .....185 N. C., 292..... 799
Robertson v. Dunn ..... 87 N. C., 191..... 777
Robertson v. R. R.....148 N. C., 323..... 174
Robinson, Caldwell v. .....179 N. C., 518, 524.....398, 449
Robinson v. McIver ..... 63 N. C., 645..... 784
Robinson, Parks v. .....138 N. C., 269..... 139
Rocky Mount Mills, Hale v.....186 N. C., 51..... 39
Rodman, Bonner v. .....163 N. C., 2..... 628
Rogers v. R. R.....186 N. C., 86..... 162
Rohr, Faust v. .....167 N. C., 360..... 17
Rollins v. R. R.....146 N. C., 153..... 174
Rollins v. Wicker .....154 N. C., 559, 560, 563..... 654, 848
Roper v. Ins. Cos.....161 N. C., 151..... 103
Rose v. Warehouse Co.....182 N. C., 107..... 774
Roseman v. Roseman .....127 N. C., 494..... 747
Rospigliosi, Thompson v. .....162 N. C., 146..... 747
Ross v. Cotton Mills.....140 N. C., 115..... 837
Rosseau, Petty v. ..... 94 N. C., 362..... 418
Roten, S. v. ..... 86 N. C., 701..... 479
Rountree, Carter v. .....109 N. C., 29..... 209
Rountree, S. v. .....181 N. C., 535..... 493, 609
Rouse, Cain v. .....186 N. C., 176..... 262
Rowe, Crutchfield v. .....184 N. C., 213..... 503
Rowland v. Rowland ..... 93 N. C., 214, 221 .....594, 692, 756
Royal v. Sprinkle ..... 46 N. C., 505..... 503

Royal, S. v. ..... 90 N. C., 755..... 418
Royster, Haskins v. ..... 70 N. C., 601..... 231
Ruark v. Harper ..... 178 N. C., 252..... 32
Rudasill v. Falls ..... 92 N. C., 226..... 527
Rudisill, Cline v. ..... 126 N. C., 523..... 170
Ruffin v. Cox ..... 71 N. C., 256..... 826
Rumbough, Realty Co. v..... 172 N. C., 747..... 503
Russell v. R. R..... 118 N. C., 1111..... 293
Rutherford v. Ray..... 147 N. C., 253..... 209
Ryder v. Oates ..... 173 N. C., 569..... 747

S

St. James v. Bagley..... 138 N. C., 384..... 625
Sanatorium v. Yadkin River Co..167 N. C., 326..... 556
Sanderlin v. Deford ..... 47 N. C., 74..... 378
Sanderlin v. Luken..... 152 N. C., 739..... 769
Sanders, Building Co. v..... 185 N. C., 328..... 422
Sanders v. Ins. Co..... 183 N. C., 66..... 411
Sanders, Kerr v. ..... 122 N. C., 635..... 211
Sanderson, Pritchard v. ..... 84 N. C., 299..... 629
Sanford, Gunter v. ..... 186 N. C., 452, 461 ..... 203, 768, 769
Satterwhite v. Gallagher ..... 173 N. C., 528..... 764
Satterwhite, Hunt v. ..... 85 N. C., 73, 74..... 540, 756
Sauls, Bank v. ..... 183 N. C., 165, 169 673
Saunders, Allen v. ..... 186 N. C., 349..... 823
Saunders v. Gatlin ..... 21 N. C., 92..... 31
Saunders, Jarman v. ..... 64 N. C., 367..... 411, 606
Saunders v. R. R..... 185 N. C., 289, 290..... 294, 850
Sawyer v. Dozier ..... 52 N. C., 7..... 140
Sawyer v. R. R..... 145 N. C., 24-27 151
Scales, Comrs. of Buncombe v....171 N. C., 523..... 578
Scales, Keith v. ..... 124 N. C., 516..... 783
Schas v. Assurance Society..... 170 N. C., 421..... 85
Schenck, Springs v..... 106 N. C., 154..... 335
School v. Peirce ..... 163 N. C., 424..... 131
School Com. v. Bd. Education....186 N. C., 643, 648..... 495, 797
School Committee, Newton v..... 158 N. C., 187..... 495
Schools, Hardware Co. v..... 151 N. C., 507..... 466
School Trustees, Smith v..... 141 N. C., 143..... 246
Scott v. Dunn ..... 21 N. C., 425..... 398
Scott v. Smith ..... 121 N. C., 94..... 548
Scott, Springs v. ..... 132 N. C., 549..... 751
Scott, S. v. ..... 182 N. C., 865, 882 413
Screws, Butts v. ..... 95 N. C., 215..... 776
Sears v. R. R..... 178 N. C., 287..... 196
Sechrist, Welborn v..... 88 N. C., 287..... 257
Secrest, Condor v. ..... 149 N. C., 205..... 540
Seip v. Wright ..... 173 N. C., 14..... 262
Sellers v. Sellers ..... 98 N. C., 13..... 585
Sermon's Land, *In re*..... 182 N. C., 128..... 694
Sessoms v. Sessoms ..... 144 N. C., 121..... 536
Setzer, Yount v. ..... 155 N. C., 213..... 257
Sexton v. Farrington ..... 185 N. C., 339..... 6, 32
Shaft, S. v. ..... 166 N. C., 407..... 728

Shaw v. Moore ..... 49 N. C., 25..... 586
Shaw v. Public Service Co.....168 N. C., 611, 617 837
Shaw, S. v. ..... 25 N. C., 532..... 586
Sheffield, S. v. .....183 N. C., 783..... 730
Shelton, S. v. ..... 47 N. C., 360..... 847
Shelton's Will, *In re*.....143 N. C., 227..... 118
Shepard v. R. R.....166 N. C., 544..... 646
Shepherd v. Lumber Co.....166 N. C., 130..... 849
Shepherd v. Shepherd .....179 N. C., 122..... 448
Sheppard, S. v. .....138 N. C., 579..... 525
Sherman, Callender v. ..... 27 N. C., 711..... 666
Sherman, S. v. .....115 N. C., 773, 774, 775..... 85, 586
Shermer, Lunn v. ..... 93 N. C., 169..... 197
Sherrard, Jones v. ..... 22 N. C., 187..... 455
Sherrill v. R. R.....140 N. C., 252..... 150
Shuford v. Comrs. of Gaston..... 86 N. C., 552..... 768
Silliman v. Whitaker .....119 N. C., 92..... 540, 756
Silver, Lefkowitz v. .....182 N. C., 339..... 41
Simmons, Modlin v. .....183 N. C., 65..... 839
Simmons v. Spruill ..... 56 N. C., 9..... 220
Simonds, S. v. .....154 N. C., 198..... 23
Simpson v. Wallace ..... 83 N. C., 477..... 752
Sinclair, S. v. .....120 N. C., 603..... 470
Sisk, S. v.....185 N. C., 696..... 662
Skinner, Hicks v. ..... 71 N. C., 543..... 843
Skinner, Hill v. .....169 N. C., 409..... 132
Skinner v. Terry .....107 N. C., 103..... 420, 445
Slagle, Hallyburton v. .....132 N. C., 947..... 603
Slaughter, Pollard v. ..... 92 N. C., 72..... 823
Sloan v. Hart .....150 N. C., 269..... 665, 667
Sloan v. R. R.....126 N. C., 490..... 219
Smarr, S. v. .....121 N. C., 669..... 584
Smiley v. Pearce ..... 98 N. C., 185..... 848
Smith, Barnhardt v. ..... 86 N. C., 479..... 848
Smith, Blake v. .....163 N. C., 274..... 196
Smith v. Comrs. of Lexington....176 N. C., 466..... 722
Smith, Coor v. .....107 N. C., 430..... 746
Smith v. Creech .....186 N. C., 187..... 139
Smith v. Electric R. R.....173 N. C., 489..... 299
Smith v. Fuller .....152 N. C., 13..... 675
Smith v. Gilmer ..... 64 N. C., 546..... 826
Smith v. Hahn ..... 80 N. C., 241..... 390
Smith v. Holmes .....167 N. C., 561..... 656
Smith, Land Co. v.....151 N. C., 70..... 620
Smith v. Love ..... 64 N. C., 439..... 578
Smith v. Low ..... 24 N. C., 457..... 220
Smith v. Lumber Co.....142 N. C., 26..... 709
Smith, Maclin v. ..... 37 N. C., 376..... 139
Smith, Miller v. .....169 N. C., 210..... 606
Smith v. Moore .....178 N. C., 374..... 537
Smith v. Morehead ..... 59 N. C., 364..... 843
Smith, Norton v. .....179 N. C., 553..... 220, 222
Smith, Ober v. ..... 73 N. C., 313..... 173, 345
Smith v. Quarries Co.....164 N. C., 338..... 740
Smith v. School Trustees.....141 N. C., 143..... 246

Smith, Scott v. ....121 N. C., 94.... 548
Smith v. Smith....150 N. C., 81.... 32
Smith, S. v. ....183 N. C., 725, 729 24
Smith v. Summerfield ....108 N. C., 284.... 82
Smith, Thompson v. ....156 N. C., 345.... 449
Smith v. Wilkins ....161 N. C., 135.... 572
Smith v. Wilkins....164 N. C., 136, 146 ....8, 325, 535
Smith's Will, *In re* ....163 N. C., 464.... 685, 860
Snipes v. Mfg. Co....152 N. C., 44, 46, 47.... 151
Snowden v. R. R.... 95 N. C., 93.... 152
Suyder v. Asheboro ....182 N. C., 710.... 85, 722
Southerland, Byrd v. ....186 N. C., 384.... 472
Southerland v. Cox.... 14 N. C., 394.... 594
Southgate, Hancock v. ....186 N. C., 281, 282....96, 237
Speaks, S. v. .... 94 N. C., 873.... 584
Speller, S. v. .... 86 N. C., 697.... 479
Spencer v. Bynum ....169 N. C., 119.... 810
Spencer v. Cohoon .... 18 N. C., 27.... 326
Spencer, Lake Drainage
Comrs. v. ....174 N. C., 36.... 209
Spencer, S. v. ....176 N. C., 709.... 722
Spicer v. Fulghum .... 67 N. C., 19.... 810
Spivey, S. v. ....132 N. C., 989.... 585, 719
Spragins, Latham v. ....162 N. C., 404.... 613
Springs v. Harven .... 56 N. C., 96.... 398
Springs v. R. R....130 N. C., 198.... 739
Springs v. Schenck ....106 N. C., 154.... 335
Springs v. Scott ....132 N. C., 549.... 751
Sprinkle v. Holton ....146 N. C., 266.... 459
Sprinkle, Royal v. .... 46 N. C., 505.... 503
Sprinkle v. Wellborn ....140 N. C., 163.... 6
Spruce Co., Byrd v. ....170 N. C., 435.... 125
Spruill, Simmons v. .... 56 N. C., 9.... 220
Sprunt v. May ....156 N. C., 388.... 527
Squires, Wallace v. ....186 N. C., 339.... 799
Stafford v. Newsom .... 31 N. C., 510.... 198
Stancill v. Joyner ....159 N. C., 617.... 411
Stancill, S. v. ....178 N. C., 683.... 315
Stanford, Culp v. ....112 N. C., 664.... 212
Stanley v. Lumber Co....184 N. C., 302, 306....366, 473
Stanly, Jones v.... 76 N. C., 355.... 231
Stanton, Bobbitt v. ....120 N. C., 253.... 112
Stanton, S. v. ....118 N. C., 1182.... 584
Star v. Oil Co....165 N. C., 587.... 800
Starnes, S. v. .... 94 N. C., 973.... 587
Starr, Burriss v. ....165 N. C., 657.... 761
S. v. Adams, ...138 N. C., 691, 696 700
S. v. Allen .... 8 N. C., 9.... 305
S. v. Allen ....107 N. C., 805.... 23
S. v. Alley ....180 N. C., 663.... 716
S. v. Archbell ....139 N. C., 537.... 470
S. v. Armfield .... 27 N. C., 207.... 663
S. v. Bailey ....100 N. C., 528.... 25
S. v. Baldwin .... 80 N. C., 390.... 586
S. v. Baldwin ....152 N. C., 822.... 470

S. v. Baldwin ..... 184 N. C., 791 729
S. v. Barber ..... 113 N. C., 711 586
S. v. Barefoot ..... 89 N. C., 565 663
S. v. Barnhill ..... 186 N. C., 446, 450 ..... 468, 723, 729
S. v. Barringer ..... 110 N. C., 525, 529 325
S. v. Benson ..... 183 N. C., 795 470
S. v. Benton ..... 19 N. C., 196, 212 ..... 584, 585
S. v. Bethea ..... 186 N. C., 22 849
S. v. Black ..... 121 N. C., 578 24
S. v. Blackwell ..... 162 N. C., 684 39
S. v. Bohanon ..... 142 N. C., 695 ..... 588, 847
S. v. Boyd ..... 175 N. C., 793 716
S. v. Boynton ..... 155 N. C., 457, 464 24
S. v. Brabham ..... 108 N. C., 793 850
S. v. Brackville ..... 106 N. C., 710 483
S. v. Bridgers ..... 161 N. C., 247 267
S. v. Bridgers ..... 178 N. C., 733 663
S. v. Brim ..... 57 N. C., 300 277
S. v. Brittain ..... 89 N. C., 481 586
S. v. Broadnax ..... 91 N. C., 543 479
S. v. Brogden ..... 111 N. C., 656 584
S. v. Brown ..... 125 N. C., 704 479
S. v. Burnett ..... 142 N. C., 580 94
S. v. Burnett ..... 179 N. C., 735 ..... 511, 514
S. v. Burton ..... 172 N. C., 942 39
S. v. Byers ..... 100 N. C., 518 469
S. v. Cameron ..... 166 N. C., 384 39
S. v. Carland ..... 90 N. C., 668, 675 ..... 471, 587
S. v. Coble ..... 181 N. C., 554 511
S. v. Cockman ..... 60 N. C., 485 588
S. v. Cody ..... 119 N. C., 908 587
S. v. Coleman ..... 178 N. C., 760, 762 404
S. v. Cook ..... 162 N. C., 586 35
S. v. Cooper ..... 83 N. C., 671 586
S. v. Cox ..... 153 N. C., 638 39
S. v. Craton ..... 28 N. C., 179 470
S. v. Credle ..... 91 N. C., 648 ..... 461, 462
S. v. Dalton ..... 178 N. C., 779 662
S. v. Daniels ..... 134 N. C., 641 699
S. v. Davidson ..... 172 N. C., 944 25
S. v. Davis ..... 77 N. C., 483 723
S. v. Davis ..... 80 N. C., 412 ..... 586, 588
S. v. Davis ..... 109 N. C., 780 585
S. v. Davis ..... 134 N. C., 633 37
S. v. Davis ..... 150 N. C., 853 198
S. v. Dill ..... 184 N. C., 650 572
S. v. Dixon ..... 114 N. C., 748, 750 479
S. v. Dixon ..... 185 N. C., 727 35
S. v. Dowdy ..... 145 N. C., 432, 436 35
S. v. Dowell ..... 106 N. C., 722 96
S. v. Driver ..... 78 N. C., 423 480
S. v. Dula ..... 61 N. C., 437 722
S. v. Edens ..... 85 N. C., 524 586
S. v. Efler ..... 85 N. C., 585 23
S. v. Emery ..... 98 N. C., 668 573

S. v. English ..... 164 N. C., 497 587
S. v. Estes ..... 185 N. C., 752 716
S. v. Everitt ..... 164 N. C., 399 611
S. v. Exum ..... 138 N. C., 599, 600 ..... 571, 850
S. v. Falkner ..... 182 N. C., 799 422
S. v. Ferguson ..... 107 N. C., 846 461
S. v. Fogleman ..... 164 N. C., 461 ..... 39, 461, 469, 723
S. v. Foster ..... 185 N. C., 674 94
S. v. Fowler ..... 151 N. C., 732 471
S. v. Frazier ..... 118 N. C., 1258 722
S. v. Freeman ..... 146 N. C., 615, 618 ..... 699, 700
S. v. French ..... 109 N. C., 722 572
S. v. Fulcher ..... 184 N. C., 663, 665 ..... 153, 805
S. v. Fulford ..... 124 N. C., 798 25
S. v. Gardner ..... 104 N. C., 739 585
S. v. Gash ..... 177 N. C., 595 609
S. v. George ..... 30 N. C., 324 849
S. v. Glen ..... 52 N. C., 321 803
S. v. Goodson ..... 107 N. C., 798 483
S. v. Graham ..... 74 N. C., 646 699
S. v. Greer ..... 173 N. C., 759 611
S. v. Griffice ..... 74 N. C., 316 586
S. v. Griffin ..... 154 N. C., 611 ..... 704, 705
S. v. Griffith ..... 185 N. C., 759, 760 ..... 700, 723
S. v. Groves ..... 19 N. C., 822 25
S. v. Hairston ..... 121 N. C., 579 24
S. v. Hall ..... 183 N. C., 806 847
S. v. Haney ..... 19 N. C., 390 728
S. v. Hardin ..... 19 N. C., 407 728
S. v. Hardin ..... 183 N. C., 815 611
S. v. Hargrave ..... 100 N. C., 484 586
S. v. Hart ..... 186 N. C., 589 310
S. v. Hawley ..... 186 N. C., 433 96
S. v. Haywood ..... 94 N. C., 847 585
S. v. Hedgecock ..... 185 N. C., 714 96
S. v. Hensley ..... 94 N. C., 1021 584
S. v. Hight ..... 150 N. C., 817 315
S. v. Hill ..... 166 N. C., 298 704
S. v. Hite ..... 141 N. C., 769 716
S. v. Hoggard ..... 180 N. C., 678 611
S. v. Holland ..... 83 N. C., 624 ..... 25, 728
S. v. Holt ..... 90 N. C., 753 310
S. v. Hopkins ..... 154 N. C., 622 ..... 585, 719
S. v. Hopper ..... 186 N. C., 411 720
S. v. Howard ..... 82 N. C., 623 586
S. v. Hullen ..... 133 N. C., 656 492
S. v. Jackson ..... 13 N. C., 563 404
S. v. Jackson ..... 183 N. C., 698 ..... 390, 448
S. v. Jefferson ..... 125 N. C., 712 847
S. v. Jeffries ..... 117 N. C., 727 722
S. v. Jessup ..... 183 N. C., 771 609
S. v. Jestes ..... 185 N. C., 736 ..... 85, 722
S. v. Johnson ..... 161 N. C., 264 589
S. v. Johnson ..... 170 N. C., 690 490
S. v. Johnson ..... 172 N. C., 925 39

S. v. Jones ..... 83 N. C., 605..... 96
S. v. Jones ..... 139 N. C., 613..... 211
S. v. Jones ..... 182 N. C., 781..... 531
S. v. Journegan ..... 185 N. C., 707..... 366
S. v. Joyner ..... 81 N. C., 534..... 325
S. v. Ketchey ..... 70 N. C., 621..... 116, 586
S. v. Kilgore ..... 93 N. C., 533..... 587
S. v. Killian ..... 173 N. C., 792..... 491
S. v. Kincaid ..... 183 N. C., 709..... 730
S. v. Kirkpatrick ..... 179 N. C., 747..... 260
S. v. Krout ..... 183 N. C., 804..... 850
S. v. Lambert ..... 93 N. C., 618..... 586, 588
S. v. Lance ..... 166 N. C., 413..... 469
S. v. Lane ..... 166 N. C., 333..... 8, 589, 723, 725
S. v. Laney ..... 87 N. C., 535..... 663
S. v. Leeper ..... 146 N. C., 655..... 96
S. v. Lewis ..... 185 N. C., 643..... 94
S. v. Lilliston ..... 141 N. C., 857..... 662
S. v. Lilly ..... 116 N. C., 1049..... 479
S. v. Little ..... 178 N. C., 722..... 471
S. v. Loftin ..... 186 N. C., 205..... 656
S. v. Lyle ..... 100 N. C., 497..... 203, 210
S. v. McAdden ..... 71 N. C., 207..... 663
S. v. McCanless ..... 182 N. C., 843..... 722
S. v. McCauless ..... 31 N. C., 375..... 663
S. v. McGlammery ..... 173 N. C., 750..... 473
S. v. McIver ..... 175 N. C., 761..... 609
S. v. McRae ..... 120 N. C., 608..... 492
S. v. McRae ..... 170 N. C., 712..... 704, 705
S. v. Mallard ..... 184 N. C., 667..... 584
S. v. Manuel ..... 20 N. C., 146..... 480
S. v. Martin ..... 173 N. C., 808..... 10, 39, 700
S. v. Massey ..... 86 N. C., 658..... 855
S. v. Maynard ..... 184 N. C., 653..... 588
S. v. Melton ..... 166 N. C., 442..... 24
S. v. Merrick ..... 171 N. C., 788, 795..... 25, 589
S. v. Merrick ..... 172 N. C., 872..... 39
S. v. Miller ..... 97 N. C., 487..... 728
S. v. Mills ..... 91 N. C., 594..... 847
S. v. Montgomery ..... 183 N. C., 747..... 730
S. v. Moore ..... 111 N. C., 672..... 198
S. v. Moore ..... 120 N. C., 570..... 584
S. v. Morris ..... 84 N. C., 756..... 699
S. v. Morris ..... 104 N. C., 837..... 805
S. v. Morrison ..... 14 N. C., 299..... 573
S. v. Morrison ..... 126 N. C., 1123..... 28
S. v. Murphrey ..... 186 N. C., 113..... 656, 716
S. v. Nat ..... 51 N. C., 114..... 469
S. v. Neville ..... 175 N. C., 731, 735..... 24, 722
S. v. Newsom ..... 27 N. C., 250..... 202
S. v. Norwood ..... 115 N. C., 789..... 470
S. v. Parker ..... 132 N. C., 1015..... 584
S. v. Pearson ..... 181 N. C., 588..... 24
S. v. Peoples ..... 131 N. C., 788..... 586

S. v. Perry ..... 44 N. C., 330..... 584, 586
S. v. Phillips ..... 185 N. C., 620..... 611
S. v. Pigford ..... 117 N. C., 748..... 479
S. v. Pollok ..... 26 N. C., 305..... 663
S. v. Potts ..... 100 N. C., 457..... 586
S. v. Powell ..... 94 N. C., 965..... 587
S. v. Powell ..... 100 N. C., 525..... 620
S. v. Ragland ..... 75 N. C., 12..... 586
S. v. R. R. ..... 145 N. C., 495, 499 ..... 416, 521, 548
S. v. Ray ..... 32 N. C., 29..... 663
S. v. Reams ..... 121 N. C., 556..... 479
S. v. Register ..... 133 N. C., 746..... 728
S. v. Reitz ..... 83 N. C., 634..... 699
S. v. Riley ..... 113 N. C., 651..... 716
S. v. Roten ..... 86 N. C., 701..... 479
S. v. Rountree ..... 181 N. C., 535..... 493, 609
S. v. Royal ..... 90 N. C., 755..... 418
S. v. Scott ..... 182 N. C., 865, 882 413
S. v. Shaft ..... 166 N. C., 407..... 728
S. v. Shaw ..... 25 N. C., 532..... 586
S. v. Sheffield ..... 183 N. C., 783..... 730
S. v. Shelton ..... 47 N. C., 360..... 847
S. v. Sheppard ..... 138 N. C., 579..... 525
S. v. Sherman ..... 115 N. C., 773, 774..... 585, 586
S. v. Simonds ..... 154 N. C., 198..... 23
S. v. Sinclair ..... 120 N. C., 603..... 470
S. v. Sisk ..... 185 N. C., 696..... 662
S. v. Smarr ..... 121 N. C., 669..... 584
S. v. Smith ..... 183 N. C., 725, 729 24
S. v. Speaks ..... 94 N. C., 873..... 584
S. v. Speller ..... 86 N. C., 697..... 479
S. v. Spencer ..... 176 N. C., 709..... 722
S. v. Spivey ..... 132 N. C., 989..... 585, 719
S. v. Stancill ..... 178 N. C., 683..... 315
S. v. Stanton ..... 118 N. C., 1182..... 584
S. v. Starnes ..... 94 N. C., 973..... 587
S. v. Strange ..... 183 N. C., 775..... 97, 404, 611
S. v. Sudderth ..... 184 N. C., 753..... 609
S. v. Sultan ..... 142 N. C., 569..... 586, 587
S. v. Teachey ..... 138 N. C., 587..... 847
S. v. Terry ..... 173 N. C., 761..... 584
S. v. Thomas ..... 64 N. C., 74..... 311
S. v. Thomas ..... 184 N. C., 757..... 24, 482
S. v. Tolever ..... 27 N. C., 452..... 663
S. v. Tomlinson ..... 25 N. C., 32..... 805
S. v. Toole ..... 106 N. C., 736..... 97, 404
S. v. Twitty ..... 9 N. C., 248..... 315
S. v. Tyson ..... 133 N. C., 692..... 37
S. v. Upton ..... 170 N. C., 769, 771..... 585, 588
S. v. Vann ..... 162 N. C., 534..... 586
S. v. Van Pelt ..... 136 N. C., 664..... 50, 51, 231
S. v. Varner ..... 115 N. C., 745..... 25
S. v. Vick ..... 132 N. C., 995, 997 ..... 585, 586, 719
S. v. Vickers ..... 184 N. C., 677..... 611

S. v. Walton ....114 N. C., 783.... 315
S. v. West .... 51 N. C., 505.... 470
S. v. White .... 68 N. C., 158.... 585
S. v. White ....138 N. C., 722.... 589
S. v. Whitfield .... 92 N. C., 831.... 587
S. v. Whitley .... 88 N. C., 691.... 586
S. v. Wilcox ....132 N. C., 1139.... 483
S. v. Wilkerson .... 98 N. C., 969.... 462
S. v. Wilkerson ....164 N. C., 432.... 9
S. v. Williams .... 75 N. C., 134.... 408
S. v. Williams ....150 N. C., 802.... 704, 705
S. v. Williams ....168 N. C., 191.... 722
S. v. Williams ....185 N. C., 664, 666 ....468, 587, 730
S. v. Williams ....186 N. C., 627.... 855
S. v. Winder ....183 N. C., 777.... 730
S. v. Woodfin .... 87 N. C., 526.... 479
S. v. Woodlief ....172 N. C., 887.... 479, 480
S. v. Worth ....116 N. C., 1007.... 535
S. v. Yearwood ....178 N. C., 813.... 722
Staton v. R. R....144 N. C., 135.... 740
Staton, Tarboro v. ....156 N. C., 504.... 769
Steamboat Co., Darden v....107 N. C., 437.... 46, 335
Stephenson, Zeiger v. ....153 N. C., 528.... 262
Stevens v. Ely.... 16 N. C., 493.... 784
Stevens, Morrisett v. ....136 N. C., 160.... 536
Stevens v. Turlington ....186 N. C., 191.... 241
Stewart, Austin v. ....126 N. C., 525.... 211
Stewart, Avery v. ....136 N. C., 426.... 579
Stewart v. Bryan ....121 N. C., 46.... 170
Stewart v. Carpet Co....138 N. C., 60, 66....9, 837
Stewart v. R. R....137 N. C., 690.... 292, 294
Stewart, Taylor v. ....172 N. C., 203, 205 ....293, 352, 799
Stocks, Haddock v. ....167 N. C., 70.... 746
Stocks v. Stocks ....179 N. C., 288.... 209
Stockton v. Mining Co. ....144 N. C., 595.... 605
Stokes, Heilig v. .... 63 N. C., 612.... 411
Stokes v. Taylor ....104 N. C., 394.... 82
Stone, *In re* ....176 N. C., 337.... 747
Stone v. R. R....144 N. C., 220....143, 173, 174
Stone, Trust Co. v. ....176 N. C., 270.... 822
Strange, S. v. ....183 N. C., 775....97, 404, 611
Street v. Andrews ....115 N. C., 417.... 22, 155
Strickland, Carter v. ....165 N. C., 69.... 424
Strickland v. Kress ....183 N. C., 536.... 503
Stroud v. Morrow .... 52 N. C., 463.... 139, 140
Stultz v. Thomas ....182 N. C., 473.... 296
Stutts, Munroe v. .... 31 N. C., 49.... 503
Sudderth, S. v. ....184 N. C., 763.... 609
Sugg, Dancy v. .... 19 N. C., 515.... 654
Sugg v. Ins. Co.... 98 N. C., 143.... 102
Sullivan, Batts v. ....182 N. C., 129.... 274
Sultan, S. v. ....142 N. C., 569.... 586, 587
Summerfield, Smith v. ....108 N. C., 284.... 82
Summerrow v. Baruch ....128 N. C., 202.... 503

Summers v. Moore ..... 113 N. C., 394 579
Summers v. R. R. ..... 138 N. C., 295 174
Sumner v. Candler ..... 92 N. C., 635 463
Supervisors v. Comrs. of Pitt ..... 169 N. C., 548 21
Supply Co. v. Dowd ..... 146 N. C., 191 523
Supply Co., Harper v. ..... 184 N. C., 204 ..... 98, 491
Supply Co. v. Watt ..... 181 N. C., 432 251
Supreme Council, Hollingsworth v. ..... 175 N. C., 615 342
Swanner, Perry v. ..... 150 N. C., 141 466
Swanson, Collins v. ..... 121 N. C., 67 31
Sweaney, Clark v. ..... 175 N. C., 280, 282 ..... 352, 799
Sweaney, Clark v. ..... 176 N. C., 529 799
Sykes v. Weatherly ..... 110 N. C., 131 390

T

Talley, Mitchell v. ..... 182 N. C., 683, 688 ..... 376, 532
Talley v. R. R. ..... 163 N. C., 581 150
Tanning Co., Fore v. ..... 175 N. C., 584 739
Tanning Co., Tisdale v. ..... 185 N. C., 501 300
Tarboro, Forbes v. ..... 185 N. C., 59 769
Tarboro, Gatlin v. ..... 78 N. C., 119 620
Tarboro, Pennington v. ..... 184 N. C., 71 156
Tarboro v. Staton ..... 156 N. C., 504 769
Tarlton v. Griggs ..... 131 N. C., 216 41
Tarry, Bowser v. ..... 156 N. C., 38 422
Tatham v. Mfg. Co. ..... 180 N. C., 627 847
Tayloe v. Carrow ..... 156 N. C., 6 599
Taylor v. Brown ..... 165 N. C., 157 507
Taylor, Dail v. ..... 151 N. C., 284 837
Taylor v. Eatman ..... 92 N. C., 601, 607 ..... 602, 815, 816
Taylor v. Hunt ..... 118 N. C., 168 503
Taylor v. Lanier ..... 7 N. C., 98 595
Taylor v. Lumber Co. ..... 173 N. C., 112, 116, 117 ..... 293, 296
Taylor v. Pope ..... 106 N. C., 267 447
Taylor v. Stewart ..... 172 N. C., 203, 205 ..... 293, 352, 799
Taylor, Stokes v. ..... 104 N. C., 394 82
Taylor, Walker v. ..... 144 N. C., 175 692
Teachey, S. v. ..... 138 N. C., 587 847
Teachey, Williams v. ..... 85 N. C., 402, 404 673
Tel. Co., Copland v. ..... 136 N. C., 13 658
Tel. Co., Harton v. ..... 141 N. C., 455 295
Tel. Co., Hollifield v. ..... 172 N. C., 714 ..... 739, 740
Tel. Co., Investment Co. v. ..... 156 N. C., 259 745
Tel. Co., Nance v. ..... 177 N. C., 315 473
Tel. Co., Wheeler v. ..... 172 N. C., 9 652
Temple v. LaBerge ..... 184 N. C., 254 237
Terry, Albertson v. ..... 108 N. C., 75 390
Terry v. R. R. ..... 91 N. C., 236 809
Terry v. Robbins ..... 128 N. C., 142 568
Terry, Skinner v. ..... 107 N. C., 103 ..... 420, 445
Terry, S. v. ..... 173 N. C., 761 584

Thigpen v. Cotton Mills.....151 N. C., 97..... 774
Thomas v. Kelly ..... 46 N. C., 375..... 31
Thomas, S. v. ..... 64 N. C., 74..... 311
Thomas, S. v. .....184 N. C., 757..... 24, 482
Thomas, Stultz v. .....182 N. C., 473..... 296
Thompson v. Humphrey .....179 N. C., 44..... 601
Thompson v. Lumberton .....182 N. C., 260..... 548
Thompson v. Mills ..... 39 N. C., 390..... 255
Thompson, Newsome v. ..... 24 N. C., 277..... 757
Thompson v. Pope .....183 N. C., 124..... 593
Thompson v. Smith .....156 N. C., 345..... 449
Thompson v. Rospigliosi .....162 N. C., 146..... 747
Thompson v. Thompson ..... 46 N. C., 430..... 823, 826
Thornburg v. Masten ..... 86 N. C., 293..... 221
Thornton, Cole v. .....180 N. C., 90, 91.....540, 756
Thornton, Lee v. .....176 N. C., 208..... 746
Threadgill, Willoughby v. ..... 72 N. C., 438..... 418
Tilley, Marion v. .....119 N. C., 173..... 390
Tilly, Laxton v. ..... 66 N. C., 327..... 595
Timber Co. v. Yarborough.....179 N. C., 335..... 221
Tinsley, Wood v. .....138 N. C., 508..... 675
Tipton, Edwards v. ..... 77 N. C., 222, 226 326
Tisdale v. Tanning Co.....185 N. C., 501..... 300
Tise v. Whitaker .....144 N. C., 508, 510 .....52, 262, 411
Tise v. Whitaker .....146 N. C., 375..... 21
Tobacco Co., Comrs. of Durham v. .....116 N. C., 446..... 281
Tobacco Co. v. McElwee..... 94 N. C., 425..... 411
Tobacco Co. v. Tobacco Co.....144 N. C., 352..... 739
Todd v. Mackie .....160 N. C., 352..... 531
Tolever, S. v. ..... 27 N. C., 452..... 663
Tomlinson, S. v. ..... 25 N. C., 32..... 805
Toole, S. v.....106 N. C., 736..... 97, 404
Townsend, Cash Register Co. v..137 N. C., 652, 655 342
Townsend, Gore v. .....105 N. C., 228, 235.....824, 825
Trading Co. v. R. R.....178 N. C., 175..... 174
Transportation Co., Whitehurst v. .....109 N. C., 342..... 209
Triplett, Lumber Co. v.....151 N. C., 409..... 654
Triplett v. Williams .....149 N. C., 394..... 692, 756
Tripp v. Comrs. of Pitt.....158 N. C., 180..... 672
Tripp v. Little .....186 N. C., 215..... 654
Troxler v. Gant .....173 N. C., 425..... 32
Troxler v. R. R.....124 N. C., 189..... 648
Troy v. Troy..... 60 N. C., 624..... 139
Trust Co. v. Benbow.....135 N. C., 303..... 12, 335, 825
Trust Co., Holleman v.....185 N. C., 49..... 613
Trust Co., Kennedy v.....180 N. C., 225..... 398
Trust Co., McAdams v.....167 N. C., 496..... 636
Trust Co. v. Ogburn.....181 N. C., 324..... 784
Trust Co. v. Stone.....176 N. C., 270..... 822
Trustees v. Webb.....155 N. C., 379..... 246
Tucker v. Eatough.....186 N. C., 505..... 9, 46, 47, 52, 53, 406

Tudor, Tyree v. ....183 N. C., 340.... 6, 351, 352, 355, 799
Turlington v. Lucas ....186 N. C., 286.... 367
Turlington, Stevens v. ....186 N. C., 191.... 241
Turner v. Machine Co....133 N. C., 381.... 390
Turner v. Power Co....154 N. C., 131, 137....837, 838
Twitty v. Martin.... 90 N. C., 643.... 784
Twitty, S. v. .... 9 N. C., 248.... 315
Typographical Union, McGinnis v....182 N. C., 770, 771, 772, 773, 774....51, 52, 53
Tyree v. Tudor ....183 N. C., 340, 346....351, 352, 355, 799
Tyson, Dudley v. ....167 N. C., 67.... 209
Tyson, S. v. ....133 N. C., 692.... 37

U

Upton, Cohoon v. ....174 N. C., 91.... 537
Upton, S. v. ....170 N. C., 769, 771....585, 588
Utilities Co., Lea v....175 N. C., 464.... 296

V

Vance v. Vance ....118 N. C., 865.... 746
Vanderbilt, Hildebrand v. ....147 N. C., 639.... 465, 466
Vanhook v. Vanhook .... 21 N. C., 589.... 378
Vann v. Comrs. of Sampson....185 N. C., 168, 171....133, 246
Vann v. Edwards ....130 N. C., 72.... 777
Vann, Kearney v. ....154 N. C., 311.... 672
Vann, S. v. ....162 N. C., 534.... 586
Van Pelt, S. v. ....136 N. C., 664....50, 51, 231
Varner, S. v. ....115 N. C., 745.... 25
Vaughan v. Wise ....152 N. C., 31.... 63, 64
Venters, Walker v. ....148 N. C., 388.... 809
Vernoy, Grocery Co. v....167 N. C., 428.... 503
Vick v. Flournoy ....147 N. C., 209.... 376
Vick, S. v. ....132 N. C., 995, 997.... 585, 586, 719
Vickers, Cook v. ....141 N. C., 107.... 210
Vickers v. Durham ....132 N. C., 890.... 548
Vickers, S. v. ....184 N. C., 677.... 611

W

Wade v. Odeneal .... 14 N. C., 423.... 326
Wadsworth, Kirkman v. ....137 N. C., 453.... 602
Wagon Co. v. Byrd ....119 N. C., 460.... 746
Waldrop, Hampton v. ....104 N. C., 453.... 132
Walker, Branch v. .... 92 N. C., 87.... 386
Walker, Morrison v. ....179 N. C., 587.... 358
Walker v. R. R....135 N. C., 738.... 299
Walker v. Taylor ....144 N. C., 175.... 692
Walker v. Venters ....148 N. C., 388.... 809
Wall v. Wall ....126 N. C., 408.... 595
Wallace, Simpson v. .... 83 N. C., 477.... 752
Wallace v. Squires ....186 N. C., 339.... 799
Wallace v. Wilkesboro ....151 N. C., 614.... 413

Walton v. Mills ..... 86 N. C., 280..... 803
Walton v. Pearson ..... 85 N. C., 35, 48 327
Walton, S. v. ..... 114 N. C., 783..... 315
Ward v. R. R..... 161 N. C., 184, 186..... 295, 300
Ward v. R. R..... 167 N. C., 148..... 148
Wardens v. Washington ..... 109 N. C., 21..... 547
Ware, Groves v. ..... 182 N. C., 553..... 496
Warehouse Co., Advertising Co. v. ..... 186 N. C., 197..... 709
Warehouse Co., Rose v..... 182 N. C., 107..... 774
Warehouse Co. v. Ozment..... 132 N. C., 839..... 579
Warlick v. Reynolds ..... 151 N. C., 606..... 376
Warren, *In re* ..... 178 N. C., 43..... 515
Warwick, Pollock v. ..... 104 N. C., 638..... 579
Washington, Paul v. ..... 134 N. C., 364..... 548
Washington, Wardens v. ..... 109 N. C., 21..... 547
Wasson, Wittkowski v. ..... 71 N. C., 451..... 241
Watson v. Ins. Co..... 159 N. C., 638..... 101
Watt, Supply Co. v..... 181 N. C., 432..... 251
Watts, Johnson v. ..... 46 N. C., 228..... 31
Watts, Person v. ..... 184 N. C., 499, 508, 516, 517, 538, 541— 275, 279, 280, 283, 286, 287, 288
Watts v. R. R..... 183 N. C., 12..... 346
Waynesville, Lee v. ..... 184 N. C., 565..... 260
Weatherly, Sykes v. ..... 110 N. C., 131..... 390
Weaver v. Kirby ..... 186 N. C., 390..... 783
Weaver, Whitehead v. ..... 153 N. C., 88..... 540
Webb, Fisher v..... 84 N. C., 44..... 17
Webb, Trustees v. ..... 155 N. C., 379..... 246
Webb, Winston v. ..... 62 N. C., 1..... 784
Webster, Fowler v..... 173 N. C., 442..... 65
Weeks v. McPhail ..... 128 N. C., 129..... 748
Weeks v. McPhail..... 129 N. C., 73..... 748
Weeks v. Weeks ..... 40 N. C., 111, 119 746
Weil v. Casey ..... 125 N. C., 356..... 825
Weil, Cotton Mills v..... 129 N. C., 452..... 237, 532
Weil v. Woodard ..... 104 N. C., 94..... 390
Wellborn v. Finley ..... 52 N. C., 228, 237 603
Welborn v. Sechrist ..... 88 N. C., 287..... 257
Wellborn, Sprinkle v. ..... 140 N. C., 163..... 6
West, Gray v. ..... 93 N. C., 442..... 595
West v. R. R..... 140 N. C., 620..... 474
West, S. v. ..... 51 N. C., 505..... 470
Westerman v. Fiber Co..... 162 N. C., 294..... 358
Weston v. Lumber Co..... 162 N. C., 165..... 748
Wheeler, Pugh v. ..... 19 N. C., 50..... 803
Wheeler v. Tel. Co..... 172 N. C., 9..... 652
Whilden, Johnson v. ..... 166 N. C., 109..... 375
Whilden, Johnson v. ..... 171 N. C., 157..... 376
Whitaker, Francks v. ..... 116 N. C., 518..... 507
Whitaker v. Hill ..... 96 N. C., 2..... 52
Whitaker, Silliman v. ..... 119 N. C., 92..... 540, 756
Whitaker, Tise v. ..... 144 N. C., 508, 510..... 52, 262, 411
Whitaker, Tise v. ..... 146 N. C., 375..... 21

White v. Comrs. of Chowan..... 90 N. C., 437..... 247
White, Goodman v. .....174 N. C., 399..... 776
White v. Hines .....182 N. C., 276, 288, 289..... 294, 839
White, Mason v. ..... 53 N. C., 421..... 378
White, Porter v. .....128 N. C., 42..... 579
White v. Realty Co.....182 N. C., 536..... 355
White, S. v. ..... 68 N. C., 158..... 585
White, S. v. .....138 N. C., 722..... 589
White v. White ..... 15 N. C., 257..... 177
White v. White .....179 N. C., 599..... 376
Whitehead, Hale v. .....115 N. C., 29..... 586
Whitehead v. Weaver .....153 N. C., 88..... 540
Whitehurst v. Padgett .....157 N. C., 424..... 394
Whitehurst v. Trans. Co.....109 N. C., 342..... 209
Whitfield v. Garris .....131 N. C., 148..... 537
Whitfield, S. v. ..... 92 N. C., 831..... 587
Whitford v. Foy ..... 71 N. C., 527..... 337
Whitley, S. v. ..... 88 N. C., 691..... 586
Whitson, Mayo v. ..... 47 N. C., 321..... 327
Wicker, Rollins v. .....154 N. C., 559, 560, 563..... 654, 848
Wilcox, Gambrill v. .....111 N. C., 42..... 112
Wilcox, Luton v. ..... 83 N. C., 20..... 212
Wilcox, S. v. .....132 N. C., 1139..... 483
Wilkerson, Daniel v. ..... 35 N. C., 329..... 578
Wilkerson, S. v. ..... 98 N. C., 969..... 462
Wilkerson, S. v. .....164 N. C., 432..... 9
Wilkesboro, Wallace v. .....151 N. C., 614..... 413
Wilkins, Anderson v. .....142 N. C., 157..... 74
Wilkins v. Norman .....139 N. C., 39..... 692, 756
Wilkins-Ricks Co., Beck v.....186 N. C., 213..... 503
Wilkins, Smith v. .....161 N. C., 135..... 572
Wilkins, Smith v. .....164 N. C., 135, 146, 148..... 325, 535
Williams v. Bailey.....178 N. C., 632..... 509
Williams v. Blue .....173 N. C., 452..... 352, 355
Williams v. Comrs. of Craven....119 N. C., 520..... 323, 324
Williams v. Dunn .....158 N. C., 399..... 747
Williams, Faison v. .....121 N. C., 152..... 747
Williams v. Hassell ..... 74 N. C., 434..... 752
Williams v. Hedgepeth .....184 N. C., 116..... 342
Williams v. Honeycutt .....176 N. C., 102..... 41
Williams, Jones v. .....155 N. C., 179..... 112
Williams, Kennedy v. ..... 87 N. C., 6..... 21
Williams, Kernodle v. .....153 N. C., 475..... 16
Williams v. Mfg. Co.....175 N. C., 226..... 430
Williams v. Mfg. Co.....177 N. C., 515..... 241
Williams v. May .....173 N. C., 78..... 799
Williams, Mills v. ..... 33 N. C., 558..... 247
Williams, Pendleton v. .....175 N. C., 252..... 75
Williams v. R. R.....182 N. C., 267, 273 847
Williams, S. v. ..... 75 N. C., 134..... 408
Williams, S. v. .....150 N. C., 802,..... 704, 705
Williams, S. v. .....168 N. C., 191..... 722
Williams, S. v. .....185 N. C., 664, 666..... 468, 587, 730
Williams, S. v. .....186 N. C., 627..... 885

Williams v. Teachey ..... 85 N. C., 402, 404 673
Williams, Triplett v. ..... 149 N. C., 394 ..... 692, 756
Williams v. Williams ..... 17 N. C., 69 398
Williams v. Williamson ..... 28 N. C., 281 503
Williamson v. Hartman ..... 92 N. C., 236 606
Williamson, Williams v. ..... 28 N. C., 281 503
Willoughby v. Threadgill ..... 72 N. C., 438 418
Wilson, Bailey v. ..... 21 N. C., 182, 187 255
Wilson, Hargrove v. ..... 148 N. C., 439 209
Wilson v. Ins. Co. ..... 155 N. C., 173 342
Wilson v. Lumber Co. ..... 186 N. C., 57 318
Wilson v. Markley ..... 133 N. C., 616 326
Wilson, Patterson v. ..... 101 N. C., 586 507
Wilson v. Polk ..... 175 N. C., 490 352
Wilson v. R. R. ..... 90 N. C., 69 152
Winborne v. Cooperage Co. ..... 178 N. C., 90 807
Winder, Penniman v. ..... 180 N. C., 73 346
Winder, S. v. ..... 183 N. C., 777 730
Winslow, Baker v. ..... 184 N. C., 9 418
Winslow v. Hardwood Co. ..... 147 N. C., 275 9
Winslow, Johnson v. ..... 63 N. C., 552 325
Winston v. Webb ..... 62 N. C., 1 784
Wise, Vaughan v. ..... 152 N. C., 31 ..... 63, 64
Witherington v. Herring ..... 140 N. C., 497 783
Withrell v. Murphy ..... 154 N. C., 89 494
Wittkowski v. Wasson ..... 71 N. C., 451 241
Witty v. Witty ..... 184 N. C., 375 816
Wolf v. Arthur ..... 112 N. C., 692 366
Wolfe, *In re* ..... 185 N. C., 565 119
Womble v. Grocery Co. ..... 135 N. C., 474 ..... 9, 837, 850
Wood, Dawson v. ..... 177 N. C., 163 75
Wood v. Tinsley ..... 138 N. C., 508 675
Wood v. Wood ..... 181 N. C., 227 843
Woodall v. Highway Com. ..... 176 N. C., 388 132
Woodard, Weil v. ..... 104 N. C., 94 390
Woodfin, Foster v. ..... 65 N. C., 29 327
Woodfin, S. v. ..... 87 N. C., 526 479
Woodlief, S. v. ..... 172 N. C., 887 ..... 479, 480
Woodlief v. Woodlief ..... 136 N. C., 138 32
Woodruff, Richardson v. ..... 178 N. C., 46 346
Wooten, Land Co. v. ..... 177 N. C., 250 ..... 389, 441, 606
Worth v. Feed Co. ..... 172 N. C., 342 237
Worth v. R. R. ..... 89 N. C., 291 281
Worth, S. v. ..... 116 N. C., 1007 535
Worth's Will, *In re* ..... 129 N. C., 228 383
Wright, Harriss v. ..... 121 N. C., 178 247
Wright v. Hemphill ..... 81 N. C., 33 418
Wright v. Howe ..... 52 N. C., 412 5
Wright, Owens v. ..... 161 N. C., 127 344
Wright v. R. R. ..... 127 N. C., 229 294
Wright v. R. R. ..... 155 N. C., 329 153
Wright, Seip v. ..... 173 N. C., 14 262
Wyne v. R. R. ..... 182 N. C., 253 150
Wyrick v. R. R. ..... 172 N. C., 549 148

Y

Yadkin River Co., Sanatorium v. ....167 N. C., 326.... 556
Yarboro, McNair v. ....186 N. C., 111, 113....373, 448
Yarborough, Timber Co....179 N. C., 335.... 221
Yearwood, S. v. ....178 N. C., 813.... 722
Yelverton, Bank v. ....185 N. C., 318.... 197
Young, Cheatham v. ....113 N. C., 161.... 335
Yount v. Setzer ....155 N. C., 213.... 257
Yow v. Hamilton ....136 N. C., 357.... 654
Yowmans v. Hendersonville ....175 N. C., 579.... 709

Z

Zeiger v. Stephenson ....153 N. C., 528.... 262
Ziegler v. Love ....185 N. C., 42.... 540

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1923

FLOSSIE M. LITTLE, ADMINISTRATRIX OF WILLIAM R. LITTLE v. THE BANK OF WADESBORO, AS ADMINISTRATOR OF WALTER S. LITTLE, AND AS GUARDIAN OF OLLIE B. LITTLE AND JULIA L. LITTLE, MINORS, AND AS TRUSTEE, AND OLLIE B. LITTLE, SURVIVING WIDOW OF WALTER S. LITTLE.

(Filed 22 January, 1924.)

1. Deeds and Conveyances—Fraud—Limitation of Actions — Statutes — Appeal and Error.

An action to set aside a deed to lands on the ground of fraud and mistake, C. S., 444 (9), must be brought within three years next after the cause of action accrued, considered as being when the party aggrieved should have discovered the facts constituting the fraud or mistake relied upon in his suit, and the relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit.

2. Deeds and Conveyances—Fraud—Statutes—Appeal and Error.

It is fraud sufficient to set aside a deed to lands where the weakness of the grantor's mind has been designedly controlled by the influence of another to such an extent as to entirely supplant his will and cause him to make an improvident and harmful disposition of his property that he would not otherwise have made; and where in an action of this character there is sufficient evidence to establish this fact, it falls within the three year statute of limitations, C. S., 444 (9); and a contrary ruling by the trial judge constitutes reversible error.

3. Same—Verdict.

Where the evidence upon the trial to set aside a deed for fraud practiced upon the grantor is sufficient, under the provisions of C. S., 444

(9), and the trial judge has erroneously ruled to the contrary as a matter of law, this reversible error is not relieved by the principle that the statute does not begin to run till the influence has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question.

4. Same—Trusts.

Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, C. S., 444 (9), limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten years statute relating to actions to impress a trust upon property only was applicable.

APPEAL from *Harding, J.,* at June Term, 1923, of ANSON.

Civil action, wherein W. R. Little was plaintiff and the Bank of Wadesboro, as administrator, etc., and Ollie B. Little are defendants. After the trial of the cause, and pending the appeal, W. R. Little, the original plaintiff, having died, Flossie M. Little, his administratrix, was made party plaintiff and is allowed as such to prosecute said appeal.

The action, instituted on 9 August, 1920, is in effect to set aside a deed made in November, 1914, by original plaintiff, Wm. R. Little, hereinafter designated as plaintiff, conveying to Walter S. Little a large amount of property, real and personal, at a grossly inadequate price, and to charge the estate of W. S. Little, now in the hands of defendants, with the actual value of the property in favor of plaintiff and his estate, less the purchase price, etc. And there were allegations in the complaint and facts in evidence on part of plaintiff permitting the inference that John R. Little, uncle of plaintiff, died in February, 1914, leaving a last will and testament in which he devised and bequeathed to plaintiff a valuable plantation in Anson County, containing 1,222.35 acres, part of same being in a high state of cultivation, and also with much valuable timber thereon, together with a full and valuable stock and equipment, machinery, and supplies, the total property being worth over $100,000 and more. That L. L. Little, father of plaintiff, was executor of the said will, and as executor and trustee for certain purposes in the management and control of the property. That said L. L. Little had always, as against plaintiff, manifested a marked partiality for his second son, Walter Little, which became more marked and aggravated as the years passed, and soon after the death of John R. Little he became obsessed with a determined purpose to make plaintiff convey said land, machinery, and other personal property bestowed on plaintiff under the will of John R. Little to said second son, and

that by persistent threats, intimidation, etc., throughout the year he so worked on plaintiff as virtually to coerce him to convey same to Walter S. Little, at the grossly inadequate price of $35,000, by deed executed in November, 1914, and thereafter Walter S. Little took possession of said property as owner under said deed. That after selling off valuable timber on the property said Walter Little subsequently sold the land for $75,000 in cash, and the proceeds of same or much of it is now in control of defendant bank, his administrator and guardian of his children, and a portion thereof is in possession of defendant, his surviving widow. And that the value of said proceeds, together with the personal property above referred to, now in hands of defendants, with accumulated interest, amount to $122,342.67 over and above the said purchase price of $35,000. That at the death of John R. Little and before and since that time plaintiff had been a confirmed addict to the drug and liquor habits, had been in several hospitals, and sanatoriums for treatment, and during the year 1914 was emaciated in body and feeble of mind and will, and was mentally incompetent to make a deed disposing of his property, and further, that owing to his weakness of mind and body he became absolutely subject to the will of said L. L. Little, and made the conveyance to Walter S. Little under the will and dictation of L. L. Little, and which plaintiff would not otherwise have done.

Defendants averring that the property was nothing like the value claimed by plaintiff, deny that plaintiff was incompetent or that there was any undue and fraudulent influence exerted in procuring the deed, and aver that owing to plaintiff's habits of dissipation, etc., his father, realizing that he was incapable of managing wisely a property of the extent and kind conveyed in the deed, did advise and counsel a conveyance to the second son, and the payment of a proper price therefor, with a view of preventing a waste and destruction of the property and also to provide plaintiff with a means of livelihood. That the father was himself a man of large means, who made substantial provision for plaintiff in his last will and testament, and which plaintiff received and has used and enjoyed since his father's death, in addition to the $35,000 paid him for the John R. Little property. That plaintiff made the said deed of his own mind and will, and all was done with a view of providing him a competency that was within his strength and capacity. Defendants offer much evidence in support of their positions, and in addition plead the three years statute of limitations, the ten years statute, and the laches of plaintiff in failing to make claim in reasonable time, or during the lives of his father and brother, etc.

It appeared further that Walter S. Little died in January, 1919, L. L. Little, the father, died in September, 1920, and suit was com-

menced in August, 1921. That W. R. Little, as stated, died since cause was tried, and same, by leave of court, is being prosecuted by his administratrix.

The court charged the jury, ruling as a matter of law, among other things, that only the ten-year statute of limitations applied to plaintiff's suit and that on the facts presented the suit was within the time allowed by the law. On issues submitted the jury rendered the following verdict:

"1. Did the plaintiff, William R. Little, have sufficient mental capacity to make and execute the deed to Walter S. Little, dated 21 November, 1914? Answer: 'Yes.'

"2. If not, did Walter S. Little, at the time of the execution and delivery of the said deed, have notice of the want of sufficient mental capacity to make and execute the deed? Answer: '.....'

"3. Was the deed from William R. Little to Walter S. Little, dated 21 November, 1914, obtained by the undue influence of L. L. Little, as alleged in the complaint? Answer: 'Yes.'

"4. If so, did Walter S. Little have notice at the time he received the deed from William R. Little that said deed had been executed by said William R. Little by reason of the undue influence of L. L. Little? Answer: 'Yes.'

"5. Did L. L. Little act as the agent of Walter S. Little in procuring the deed from William R. Little? Answer: 'Yes.'

"6. Is the plaintiff's cause of action barred by the statute of limitations, as alleged in the defendant's answer? Answer: 'No.'

"7. Did the plaintiff exercise due diligence in electing to rescind the execution of the deed to Walter S. Little? Answer: 'Yes.'

"8. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$38,463.' "

Judgment on the verdict, and defendants excepted and appealed, assigning errors.

A. A. Tarlton, Enos T. Edwards, and Stewart, McRae & Bobbitt for plaintiff.

J. A. Lockhart, McLendon & Covington, and Caudle & Pruette for defendants.

HOKE, J. Our statute of limitations, C. S., ch. 2, sec. 444, subsec. 9, provides that actions for relief on the ground of fraud or mistake shall be brought within three years next after the cause of action accrues, the cause of action not to be considered as accruing until the discovery by the aggrieved party of the facts constituting the fraud or mistake. It will be noted from the language used, "relief on the ground of fraud," that the statute has and was intended to have a

broader meaning than the ordinary common-law actions for fraud and deceit, and in our opinion clearly applies to any and all actions legal or equitable where fraud is the basis or an essential element of the action. And this being true, it extends and should be applied to the suit as constituted in the present record.

While there is a suggestion made in *Dixon v. Green,* 178 N. C., 205, that undue influence is not always and necessarily fraudulent, when it is made to appear that one taking advantage of another's weakness has acquired a controlling influence over him, and has exerted it in a given case on an owner of property to such an extent as to entirely supplant the owner's will in the matter, and cause him to make an improvident and harmful disposition of his property that he would not otherwise have made, this is properly considered fraud of a pronounced type, so much so that in such instance "fraud" and "undue influence" are generally used together as expressing one and the same idea, and in this jurisdiction and elsewhere relief is awarded on that theory. *Myatt v. Myatt,* 149 N. C., 137; *In re Abee's Will,* 146 N. C., 273; *Posten v. Gillespie,* 58 N. C., 258; *Wright v. Howe,* 52 N. C., 412; *Marshall v. Flynn,* 49 N. C., 199; *Boardman v. Lorentzen,* 155 Wis., 566, reported also in 52 L. R. A., N. S., 476; *Whitcombe v. Whitcombe,* 205 Mass., 310; 12 R. C. L., 230-231.

In *Myatt's case, supra,* it was held: "While undue influence sufficient to set aside a deed does not necessarily include moral turpitude, or even an improper motive, yet, when the deed is the result of a dominant influence exercised over the mind of the grantor by another, so that the mind of the grantor is suppressed or supplanted and the deed expresses the will of the actor producing the result, the deed so obtained is not improperly termed fraudulent."

In the Wisconsin case, *supra:* "He who obtains property by will or otherwise through undue influence or consciously taking advantage of the incompetency of the owner, commits a fraud and of a most serious character."

And in the Massachusetts case, "Undue influence is a species of fraud, or it partakes of the nature of fraud, whether it consists of deception or of coercion without deception." In this connection, a helpful reference as to the meaning of the term "fraud" and its inclusive nature appears in *Oil Company v. Guano Company, post,* 157, opinion by *Associate Justice Stacy.*

This being the correct interpretation of the allegations of the complaint, and evidence offered by plaintiff in their support, this cause of action comes clearly within the statutory provision of three years as above set forth, and it was prejudicial error for the court to have made a contrary ruling.

It is suggested for appellee that in cases like the present, the statute does not begin to run till the influence is removed. That is the rule very generally prevailing and it has been virtually so held with us. *Oldham v. Oldham,* 58 N. C., p. 89, and other cases; 25 Cyc., p. 1195. But this, to our minds, only serves to emphasize the harmful significance of the error complained of. Under our law, as stated, the statute does not begin to run until the influence complained of has ceased. All that the jury have determined on this question is that in answer to the third issue they find that the deed of November, 1914, was procured by undue influence of L. L. Little. Whether and when such influence may have ceased, or whether it continued until three years next before action brought, and was of a kind to prevent the grantor from taking orderly and proper steps to question the validity of the deed, has never been considered or passed upon and could not be, owing to the ruling of his Honor that in any aspect of the facts the cause of action was not barred.

Again it is contended that this is an action to impress a trust upon the property, and in such cases the statute of limitations is the general statute of ten years, as his Honor ruled, which time had not elapsed when the suit was instituted. We have held in some cases that the general statute of ten years will apply when the suit is to have one declared trustee for another's benefit and the pertinent facts come directly within the effect and operation of the statute. *Sexton v. Farrington,* 185 N. C., p. 339, and authorities cited. But in this case the alleged right to impress a trust upon this property is dependent upon the validity or invalidity of the deed from plaintiff to his brother, Walter, and if the right to assail this deed is barred by the statute, any and all claim to the proceeds in the possession and control of defendants is also barred. For the purposes of this claim, the proceeds from a sale of the property stands in the place of the property itself, and if the one is protected by the statute, the other is also. *Sprinkle v. Wellborn,* 140 N. C., p. 163.

As a matter of fact and by correct interpretation, this is not an action to impress a trust upon property, but one to recover the proceeds of property acquired by fraud and undue influence and of which defendant's predecessor in title had full notice.

For the error indicated there should be a new trial of the cause and it is so ordered.

New trial.

JAMES C. AUSTIN v. SEABOARD AIR LINE RAILWAY.

(Filed 22 January, 1924.)

Carriers of Goods—Railroads—Negligence—Burden of the Issue—Prima Facie Case—Instructions—Appeal and Error—New Trials.

Upon evidence tending to show that damage was caused to a carload shipment of livestock, received in good condition by the carrier by fire at one of the carrier's stations, *in transitu*, the fact that the damages were thus caused while the shipment was in the carrier's possession raises only a *prima facie* case of negligence on the carrier's part, and does not shift the burden of the issue of its negligence to it from the plaintiff, and an instruction that places upon the defendant the burden of disproving its own negligence is reversible error.

CLARK, C. J., dissenting.

APPEAL by defendant from *Lyon, J.*, at August Term, 1923, of UNION.

Civil action. Plaintiff alleged and offered evidence tending to show that in October, 1921, he shipped a carload of high-grade cattle over defendant's road consigned to himself at Marshville, N. C., and the car containing the cattle was destroyed by fire when the same was on a station siding at Rockingham, N. C., and some of the cattle were killed and others seriously injured. That the fire was caused by sparks from the engine of another freight train of the company passing the station at the time, and the injury was due to defendant's negligence. There was denial of negligence on part of defendant or any liability arising therefrom and the cause was submitted to the jury, the questions determined in the following issues:

1. Were the cattle of plaintiff killed and injured by reason of the negligence of defendant, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is plaintiff entitled to recover? Answer: $7,500.

C. (As to the negligence alleged, if the jury find from the evidence and by its greater weight that the cattle were injured while in the custody of the railroad company, the burden of proof is on the railroad company to exculpate itself. In a shipment of livestock the burden is on the railroad company to show that injuries in transportation were not caused by its negligence.) D.

To that portion of his Honor's charge in parentheses between the letters C and D the defendant objects and excepts.

E. (The jury are instructed that if the plaintiff has satisfied them by the greater weight of the evidence that it delivered to the Seaboard Air Line Company at Raleigh, North Carolina, a carload of cattle in good order and condition to be transported by said railroad company to Marshville, N. C., and that said cattle were injured by burning while

in the car of the railroad company at Rockingham, North Carolina, then the plaintiff has made out a *prima facie* case of negligence.) G.

To that portion of his Honor's charge in parentheses between the letters E and G the defendant objects and excepts.

And the jury are further instructed that the origin may be established by circumstantial evidence, and that it is not necessary that any witness should testify that he saw sparks coming from the engine. H. (If the jury find from the evidence, and by the greater weight thereof, that the plaintiff's cattle were delivered to the defendant at Raleigh, North Carolina, in good order and condition, and that they were injured by it at Rockingham, North Carolina, then the law raises the presumption that the said cattle were injured as a result of the negligence of the defendant railroad company, and if the jury so find it is not necessary that the plaintiff point out to the jury the particular acts of negligence causing the fire, but the burden of proof rests on the defendant railroad company to show that it was not guilty of any negligence, and unless the defendant has so satisfied the jury they should answer the first issue Yes.) I.

To that portion of his Honor's charge in parentheses between the letters H and I the defendant objects and excepts.

There was judgment on the verdict for the plaintiff and the defendant company appealed assigning, among other errors, the portion of the charge above stated.

John C. Sykes and Parker & Craig for plaintiff.
Cansler & Cansler and Vann & Milliken for defendant.

HOKE, J. For reasons satisfactory to himself, no doubt owing to certain stipulations of the bill of lading restrictive of the amount recoverable on any other theory, plaintiff has elected to prosecute his claim on the ground of negligence, and the cause has been heard and determined throughout on that issue. Considering the case then, in that aspect, there is error in the charge appearing in the above exceptions in that they place on the defendant company, under the conditions suggested, the burden of disproving negligence and thereby changing the burden of the issue to defendant's prejudice. A charge substantially similar was held for reversible error in a case at the present term of *McDowell v. R. R.*, 186 N. C., 571, in which it was held as follows: "Upon conflicting evidence as to whether defendant railroad company's train, in passing the plaintiff's premises adjoining the right of way over which it passed, set afire and destroyed the plaintiff's dwelling, the finding of the fact by the jury that the fire was caused by sparks from the train is only sufficient evidence upon which the jury

may find the issue of negligence in the plaintiff's favor, and does not relieve him of the burden to establish the issue of negligence by a preponderance of the evidence." "Where the burden of the issue remains upon the plaintiff to show negligence of the defendant railroad company in causing him damage by setting fire to his property by the passing of its train, with a defective spark-arrester, it is reversible error for the trial judge to charge the jury that if they found the fire was caused by sparks from the defendant's locomotive, the burden of the issue would shift to it to disprove its negligence as the cause of the damage, the plaintiff's evidence being sufficient only to sustain a verdict on the issue, if rendered in the affirmative."

And speaking to the question in the opinion the Court said:

"The question presented has been the subject of extended discussion in this Court, and there has been some variety of decision concerning it, but it is the settled ruling of the later and prevailing cases that where it is shown that the property of a claimant has been destroyed by fire communicated from defendant's train, that will make a *prima facie* case carrying the issue of liability to the jury, and of itself and without more is sufficient to justify a verdict as for a negligent wrong."

"In numbers of cases, particularly of the former time, it is said that the facts suggested raise a presumption of negligence, but, as shown in *Overcash v. Electric Co.,* 144 N. C., 572-582, and other cases, it is but evidence and termed presumptive only in the sense as stated, that it permits and justifies an inference of liability if the jury are thereby satisfied that a negligent wrong is established, and it should never have the effect of changing the burden of the issue by putting on the defendant, as was done in the present instance, the burden of disproving the negligence charged by the greater weight of the evidence."

"Again, it is said in other decisions that when the facts suggested have been made to appear, it is the duty of the defendant to go forward with his proof; but this does not at all mean that, as a matter of law, defendant is required to offer proof in rebuttal, but only that if he fails to offer evidence in explanation of the conditions presented, he takes the risk of having a valid verdict rendered fixing him with liability."

And *White v. Hines,* 182 N. C., 276; *Page v. Mfg. Co.,* 180 N. C., 330-334; *State v. Wilkerson,* 164 N. C., 432; *Brock v. Ins. Co.,* 156 N. C., 112; *Cox v. R. R.,* 149 N. C., 117; *Winslow v. Hardwood Co.,* 147 N. C., 275; *Overcash v. Electric Co.,* 144 N. C., 572; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474; *Sweeney v. Erving,* 228 U. S., 233, are in full approval of the position. As stated in the *McDowell case, supra,* there has been some confusion in the application of the true principle, under the conditions suggested, growing chiefly out of the unfortunate use of the terms "presumption of

fact," "burden of proof," "changing," "duty of defendant to go forward," etc. A very intelligent and helpful comment on these and other like expressions appears in the valuable "Handbook on the Law of Evidence," by Prof. Lockhart, at sec. 228, and showing, among other things, as applicable to the question as usually presented in these cases, that there is not presumption of fact in any proper sense of the term, but only permissible inferences of fact if the jury see proper to adopt them. And in cases of the kind suggested on an issue of negligence of defendant, the burden of the issue is upon the plaintiff, but where it appears that goods have been shipped with a common carrier in good condition and have been lost or delivered in an injured condition, or where claimant's property has been destroyed or injured by fire communicated from defendant's engine or train, or where one, a passenger or employee, has been killed or injured by a collision or derailment of trains, and these basic facts are established by the greater weight of the evidence, a proper charge would be that they constitute or present a *prima facie* case, carrying the question of liability to the jury on the issue and without more justifying the inference of negligence if the jury so find.

For the error indicated defendant is entitled to a new trial and it is so ordered.

Error.

CLARK, C. J., dissenting: As stated in the opinion of the Court: "The plaintiff shipped a carload of high-grade cattle over the defendant's road consigned to himself at Marshville, N. C., and the car containing the cattle was destroyed by fire when the same was on a station siding at Rockingham, N. C., and some of the cattle were killed and others seriously injured." The allegation in the complaint is that the fire was caused by sparks from the engine of another freight train of the company passing the station at the time, and the injury was due to defendant's negligence. There is denial of negligence on the part of the defendant and the single inquiry submitted to the jury (besides that of the amount of damages) was: "Were the cattle of the plaintiff killed and injured by reason of the negligence of the defendant, as alleged in the complaint?" To which the jury responded, "Yes," and assessed the damages.

The jury were instructed that "if the plaintiff had satisfied them by the greater weight of the evidence that he delivered to the Seaboard Air Line Railroad Company, at Raleigh, a carload of cattle in good order and condition to be transported by said railroad company to Marshville, N. C., and that said cattle were injured by burning while in the car of the railroad company at Rockingham, N. C., then the plaintiff has made a *prima facie* case of negligence." To this the defendant excepted.

The jury were further instructed: "If the jury find from the evidence and by the greater weight thereof that the plaintiff's cattle were delivered to the Seaboard Air Line Railroad Company, at Raleigh, in good order and condition and that they were injured by it at Rockingham, N. C., then the law raises the presumption that the said cattle were injured as a result of the negligence of the defendant railroad company and if the jury so find it is not necessary that the plaintiff point out to the jury the particular acts of negligence causing the fire, but the burden of proof rests on the defendant railroad company to show it was not guilty of any negligence, and unless the defendant has so satisfied the jury they should answer the first issue 'Yes,'" and the defendant again excepted. These are the only exceptions held for error, upon which the plaintiff is subjected to the delay and great expense of another trial because the judge did not follow the language of a law-writer (whose work he may or may not have read) and tell the jury that "there was not presumption of fact in proper sense of the term, but only permissible inferences of fact if the jury see fit to adopt them," and further should have told them "Where it appears that goods have been shipped by the common carrier in good condition and have been lost or delivered in an injured condition or where claimant's property has been destroyed or injured by fire communicated from defendant's engine or train, or when a passenger or employee has been killed or injured by a collision or derailment of trains, and these basic facts are established by the greater weight of the evidence, a proper charge would be that they constitute or present a *prima facie* case, carrying the question of liability to the jury on the issue and without more justifying the inference of negligence if the jury so find."

The language used by the court was a plain common-sense ruling as to the duties of common carriers which prevailed for hundreds of years without detriment therefrom to shippers or carriers and has never been changed by any statute. The jury could understand what the court told them and there can be no reasonable doubt that it did in this case. In the language now suggested as a substitute it is more than doubtful if the average juror could understand any difference between that and what is suggested as a more perfect language that should be used. The object of a trial by jury should be the ascertainment of the facts in controversy and the language used by the judge was not only consecrated by the usage of centuries, but was a plain statement of what was submitted to them and could not confuse the jury. It was the every-day language of practical men and not the cloistered lucubrations of scholars.

The defendant accepted the cattle for transportation and assumed the duty of their delivery in good condition. Not having done so, the

burden was on the carrier to show that failure to do so was without fault on its part. The jury have found that the carrier has not done this.

It is admitted by the defendant that the destruction of the cattle was caused by the burning of the car; that the car belonged to the defendant; that it was a part of one of the defendant's trains; that it was in one of the defendant's yards, and that it was surrounded by defendant's agents and servants and that defendant's trains were passing by. In such case the origin of the fire is peculiarly a matter within the knowledge of the defendant.

When the plaintiff proved the delivery of the animals to defendant and their destruction while in transit (which is indeed admitted) then the burden was upon defendant to exculpate himself and the charge above set out was correct. The contract of safe carriage is assumed by the defendant.

If the carrier does not assume the burden of excusing himself from loss or damage in transportation when it has been admitted that these occurred in the carriage of freight, then all the rules which govern the transportation of freight are revolutionized and there has been no statute which has authorized a change of this well-settled principle of law.

Whether there was excuse for the defendant was a matter within its own knowledge which could only be settled by the testimony of witnesses and the verdict of a jury. For many hundreds of years issues of fact have been thus settled and the only burden ever imposed has been that the plaintiff must prove his allegation to the satisfaction of the jury and that when the damage or destruction has occurred in the course of transportation it devolves upon the carrier to prove in like manner to the satisfaction of the jury the grounds upon which it should be excused from liability for its default in safe carriage.

This is an important matter to all shippers of freight throughout the country. In *McDowell v. R. R.*, 186 N. C., 579, the writer in the dissenting opinion pointed to the fact that "There has been no statute whatever in North Carolina, nor any indication of one, laying down a rule requiring the complicated disquisition to the jury which can have no effect except to divert attention from the matter which the jury are to determine," and said:

"Some fifteen or twenty years ago some dreamer or idealist conceived the design of splitting up the simple burden which the jury could understand, of 'fully satisfied' and 'by the greater weight of the evidence' and procured this Court to hold, as he had previously persuaded some others to hold, that the burden of proof should be split up, and there then began the installation of the doctrine of the 'burden of proof'

shifting and then there was the addition of the 'burden of the issue,' and then that these could shift, and then some ingenious and metaphysical word-carpenter added the doctrine of *prima facie* case and when that would carry the burden of liability to the jury or not, and the doctrine of *res ipsa loquitur* and the presumption of law and presumption of fact and as to which of these was preponderant, and when each of them should prevail and when they should shift back and when it was requisite to tell the jury as to these different shiftings backwards and forwards. The result has been so to entangle the matter that it is safe to say that there is not a judge presiding in any trial court in North Carolina today who can, with any safety of being affirmed on appeal, charge the jury as to these various weighty matters as to whether the burden of the *prima facie* case, or the burden of proof, or the burden of the issue or either of the presumptions should shift or exactly when it should shift and at what particular time it should be transferred, and whether and when the party shifting or transferring 'should go forward with proof,' and many other equally intelligible refinements.

"Instead of the law being simplified it has been inextricably confused, and it has been made impossible for any judge to assert with certainty that he has complied with these difficult and numerous complicated and embarrassing requirements which have been substituted for the old-fashioned, age-long requirement, which alone juries can understand and do understand, as to which side has the burden of proof. 'By the multitude of words counsel has been darkened.' "

Also "If this innovation had been brought about by any statute there might have been some clear form of expression prescribed which would enable the judges to guess as to the various phases of these technicalities and the exact time and the exact shifting of the preponderance of these various matters, and the indications that would foreshadow and adumbrate them, and to what extent they may go."

Again that opinion says: "The greatest trouble in the introduction of so many technicalities, so many ways of 'distinguishing and dividing a hair betwixt south and southwest side,' is the enormous and overwhelming advantage it gives wealthy suitors and corporations in delaying trials, making them costly, not only by the refinements as to the burden of these imperceptible distinctions as to who, at a given moment is chargeable with the burden upon any given point, but by insuring, as in this case, a new trial upon some perfectly immaterial and irrelevant matter which, no matter how it had been charged, according to the new rules, would not have made any difference to the jury who could not have understood such refinements."

Though the innovation above set out first appeared in this Court upon a divided opinion of three judges to two, without the authority of any statute, its continuance is practically making it impossible for any man with ordinary means to contest with the numerous able counsel of great corporations whenever there has been a failure of the carrier to carry out the plain and simple contract to carry and deliver the shipment safely or to show good legal cause why it has failed to do so; and to require these complicated charges as to the shifting of proof and other "shifts" above recited, will practically enable the carrier to get a new trial in every case and whether successful or not in the long run, the plaintiff will have lost the value of the shipment in the costs and loss of time and annoyances of litigation.

The public interest requires the earliest and promptest return to the requirement of hundreds of years which is simply that the burden of proving the acceptance of the goods by the carrier and its nondelivery in good condition according to contract, and this being proven or admitted (as in this case) the burden then devolves upon the carrier to show matter in excuse. The additions to these simple requirements by a divided Court, as above stated, cannot result in other than making more difficult the administration of the law in all such cases.

SANFORD REAL ESTATE, LOAN & INSURANCE COMPANY AND R. L. POINDEXTER v. E. L. GAVIN, TRUSTEE, AND W. D. WRIGHT.

(Filed 22 January, 1924.)

1. Bills and Notes—Negotiable Instruments—Endorsement—Parol Agreement—Evidence.

As between the original parties, not affecting the rights of a subsequent holder in due course, the acquisition of a negotiable note secured by mortgage as one of a series by endorsement may be shown by parol evidence to have been upon condition that its payment under foreclosure proceedings was postponed to the prior payment of the other notes in the series.

2. Same—Compromise.

The acceptance by endorsement of an agent for selling real estate, of one of a series of notes secured by a mortgage upon parol agreement between the owner that its payment from the proceeds of sale should be postponed in the event of foreclosure to that of the other notes in the series, may be upheld as being in the nature of a compromise between the parties of the amount due.

3. Same—Memorandum—Writing—Corroboration.

Where the endorsee of a note secured as one of a series in a mortgage has acquired it after its execution under a valid parol agreement that in the event of foreclosure its payment was to be made from the proceeds of sale in postponement to that of the other notes of the series, and the note so acquired has been lost, and a written memorandum of the parol agreement has later been made, the action may be maintained upon the parol agreement and the written memorandum introduced as corroborative evidence.

4. Same—Pleadings—Equity.

The objection that a valid parol agreement as a consideration upon which an endorsee has acquired a note secured by mortgage, must be pleaded to become available, is untenable, an action thereon being maintainable at law, and no equity of cancellation or correction being required in the action.

APPEAL by plaintiff from *Horton, J.,* at May Term, 1923, of LEE.

Civil action. Plaintiffs holding a note for $3,000, being No. 5 of a series of notes of $3,000, secured by a deed of trust on real property, sued defendants to recover their *pro rata* amount alleged to be due from the proceeds of a foreclosure sale of the property, and wrongfully withheld by defendants. Defendants deny liability, claiming that this note, No. 5, was assigned to plaintiff, R. L. Poindexter, with written notice thereon that coplaintiff insurance company was entitled to one-half of same, with the distinct understanding and agreement that this note, No. 5, should be paid out of the proceeds of sale only after the other four notes were satisfied.

On the issues thus raised there were facts in evidence tending to show that defendant W. D. Bright, original owner, had sold his land to one J. R. High for $20,000, $5,000 of same being paid cash and the remainder evidenced by five promissory notes of $3,000 each, numbered consecutively one to five, and secured by deed of trust on the property to defendant E. L. Gavin as trustee. That soon after these notes were executed defendant W. D. Bright had assigned the note sued on, No. 5, to R. L. Poindexter coplaintiff, with the distinct understanding and agreement at the time of the transfer that in case of foreclosure had the holder should only be paid after the other four notes held by W. D. Bright. The evidence tended to show that the contract of transfer of note to Poindexter was made in parol, and that Gavin, trustee, shortly thereafter made a copy of same showing the stipulations as claimed by defendants, and on proof of loss of original a carbon copy of same, proven to have been an exact copy of original, was admitted in evidence. Both the trustee Gavin and the owner Bright having testified to the contract of transfer by parol and that the copy offered was in accord with the same. That default having been made in the payment of the

notes secured by the deed, or any of them, there was foreclosure sale by the trustee and the land was bought and now held by the original owner at the price of $8,000, the suit, as stated, being for the *pro rata* share of this $8,000.

On issues submitted the jury returned the following verdict:

1. Did the defendant transfer and deliver the note numbered "5" to the plaintiffs with the understanding and agreement that the same was not to be paid out of the proceeds of sale of the land under the deed of trust until after defendant had first been paid his four notes in full as alleged in the answer? Answer: Yes.

Judgment on verdict for defendants; plaintiffs excepted and appealed, assigning for error chiefly (1) the admission of parol evidence of the stipulations of the contract of assignment and endorsement appearing on note No. 5; (2) the admission of parol or other evidence in contradiction of the deed of trust and in derogation of plaintiffs' rights as holders of one of the notes therein secured.

Seawell & Pittman for plaintiffs.
Hoyle & Hoyle and H. M. Jackson for defendants.

HOKE, J. On careful examination of the record we find no reason for disturbing the results of the trial. It is the recognized principle here that on a written endorsement or transfer of a negotiable instrument, and as between the immediate parties thereto, parol evidence is competent to establish stipulations and conditions affecting their rights, and the plaintiffs' objection to the admission of such evidence was therefore properly overruled. *Kernodle v. Williams,* 153 N. C., 475; *Aden v. Doub,* 146 N. C., 10; *Penniman v. Alexander,* 111 N. C., 427; *Braswell v. Pope,* 82 N. C., 57; *Kerchner v. McRae,* 80 N. C., 219. In *Penniman's case, supra,* the general principle is stated as follows: "The maker of a promissory note, or other similar instruments, if sued by the payee may show as between them a collateral agreement putting the payment upon a contingency, and it is competent also for a defendant sued as acceptor of such instrument to show in his defense the condition of his acceptance." Nor can the exception be sustained that the defense presented and the parol evidence offered in its support, are in contravention of the written stipulations of the deed of trust. If the plaintiffs had shown themselves to be the unqualified owners of the note sued on, as for instance, endorsers for value and without notice, the position would be deserving of consideration, but under the defense presented and evidence in question, it has been established by the verdict that on the contract of endorsement made after the deed of trust and affecting only the distribution of the proceeds, plaintiffs agreed that

the note assigned to them should share in the proceeds only after the other four notes, amounting to $12,000 and interest, were fully paid. The parties had a right to make this a subsequent contract modifying the stipulations of the deed of trust. It is not an agreement required to be in writing, and to our minds no reason can be suggested why such an agreement should not be given effect. *Faust v. Rohr,* 167 N. C., 360; 4 Page on Contracts (2 ed.), sec. 2484; 6 R. C. L., 299. True that such a contract, like others, unless under seal, require a consideration to support it, but on the evidence such a consideration appears from the fact that the plaintiff thereby acquired the note that he sues on. And if it should be referred to the rights claimed in plaintiffs' favor for compensation in effecting the original sale, the stipulations by which the note was obtained and postponing payment could well be upheld as a proper compromise and adjustment of a *bona fide* dispute between the parties as to the amount due. *Fisher v. Lumber Co.,* 183 N. C., 485-489, citing, among other authorities, *Dunbar v. Dunbar,* 180 Mass., 170; *Dickerson v. Dickerson,* 19 Ga. App., 269; 6 R. C. L., 662, Title Contracts, sec. 71; 5 R. C. L., Title Compromise, sec. 13. It is further contended for appellant that the written contract which had been lost could not be made available in support of defendant's position without allegations upon which to rest it, but this, in our opinion, does not at all correctly interpret the record. The contract relied upon by defendant was made in parol and the memorandum in writing which only one of defendants made afterwards was no doubt for the purpose of preserving the evidence in available form. The written paper was not relied upon as the basis of recovery, but was only received as evidence in support of the verbal contract already entered into, and was undoubtedly competent as evidence in corroboration of the oral testimony of both Bright and Gavin, tending to establish the agreements as alleged. *Gooding v. Moore,* 150 N. C., 195. Even if the written paper was the basis of the defense and had been lost the position of appellant could not be upheld; a written paper conferring or creating an absolute legal right may be enforced by action at law though lost. *Fisher v. Webb,* 84 N. C., 44. It is only when it becomes necessary to have an instrument corrected or canceled for fraud, mistake, and the like, by invoking the equitable powers of the court for the purpose, that the pertinent facts must be alleged before proof can be offered. But no such question is presented in this case where, as stated, a definite legal right was acquired by contract at the time of the assignment and this right has been established by the verdict of the jury.

There is no error and the judgment for defendant is affirmed.

No error.

E. S. DRAPER v. CONNER & WALTERS COMPANY.

(Filed 22 January, 1924.)

1. **Evidence—Easements—Questions for Jury.**

Where there is more than a scintilla of evidence tending to show the plaintiff's right of easement in adjoining lands, either by grant, prescription or dedication to and acceptance by a municipality, the question should be submitted to the jury.

2. **Easements—User—Evidence—Prescriptive Right—Lost Grant—Pleadings—Profert.**

An easement may be obtained and secured in the lands of an adjoining owner by use and possession, exercised under a claim of right when open, peaceable and adequately continuous, and after a sufficient lapse of time a presumption is raised that it was acquired under a written and sufficient grant which has since been lost, that avoids the rule of pleading requiring profert.

3. **Same—Presumptions—Lost Grant.**

In an action to establish a prescriptive right of easement in the lands of an adjoining owner, the doctrine of a lost grant is not precluded as a matter of law if the original deed in a long chain of title refers to the easement as one previously existing, and upon the evidence in this case, *held*, that the evidence of the plaintiff's right by immemorial prescription, as well as by dedication and acceptance, was sufficient to take the issue to the jury.

4. **Easements—Permissive User—Dedication—Intent—Acceptance.**

The mere permissive user of an easement by the public the owner has maintained on his own land for his sole convenience, will not amount to a dedication, for it is necessary to show that the owner intended to dedicate the easement either by express language, by reservation, or by his conduct.

APPEAL from *Harding, J.*, at September Term, 1923, of MECKLENBURG.

On 25 September, 1890, E. K. P. Osborne and wife conveyed to George Messer a lot in the city of Charlotte fronting on West Fourth Street, and on 13 February, 1893, Messer conveyed the same lot to George E. Falls. On 10 January, 1894, Joseph E. Falls and wife conveyed to George M. Messer a portion of this lot, the beginning corner of which was 110 feet from Fourth Street. After the description of the lot conveyed (the rear portion of the lot in the first two deeds) the following provisions are contained in the deed: "Together with the right to the use and benefit of a 12-foot alley now open and extending along the west side of J. E. Falls' lot (in front of this lot) from Fourth Street back to the lot hereby conveyed in common with said J. E. Falls, his heirs and assigns, subject to the right of way and all other rights in, to, and over the alley-way or street (in rear of this property and 6

feet near line of which is on this property), which have been heretofore conveyed by said Messer to E. K. P. Osborne and others; subject also to the right to the use and benefit of a 12-foot alley now open on the west side of this lot which said Jos. E. Falls reserves to himself and his heirs and excepts from the operation of this deed."

On 6 April, 1896, J. E. Falls and wife conveyed to J. M. Goode the remainder (the front part) of the lot described in the first two deeds.

On 19 October, 1899, Geo. M. Messer and wife conveyed to N. B. Wilds, the description being the same as in the deed from Falls to Messer, and on 1 April, 1903, Wilds conveyed the same lot to John R. Pharr. On 25 February, 1920, Pharr conveyed to Charles Arey. The remainder of the lot described in the first two deeds (the front part) was conveyed by H. N. Pharr and E. R. Preston, commissioners of the Goode estate, to Charles Arey on 21 September, 1891.

On 21 September, 1921, Charles Arey and wife conveyed the whole lot to the defendants. In the deed from Falls to Goode, from Messer to Wilds, from Pharr to Arey, from Pharr and Preston to Arey, and from Arey to the defendant there are provisions substantially similar to those in the deed from Joseph E. Falls to Messer.

The plaintiff's lot lies to the west of and adjoins the defendant's lot on which the alley in question was situated, but the plaintiff's deed, so far as the record shows, makes no reference to the alley. This alley and another at the rear of the two lots intersect at right angles.

After the defendant received his deed he closed the alley opening on Fourth Street and the plaintiff brought suit praying that he be adjudged entitled to an easement in the alley and that the defendant be enjoined from obstructing it or permitting it to remain obstructed.

The court instructed the jury to answer the issues "No" if they found the facts to be as testified to by the witnesses.

The verdict was as follows:

"1. Is the alley leading from Fourth Street east of the plaintiff's land described in the complaint as a public alley, as alleged in the complaint? Answer: 'No.'

"2. Is the plaintiff the owner of an easement or right of way over the tract of land covered by the alley lying east of plaintiff's lot and running back over the defendant's lot from Fourth Street, as alleged in the complaint? Answer: 'No.'"

Judgment and appeal by the plaintiff.

C. H. Gover for plaintiff.

H. L. Taylor and Parker, Stewart, McRae & Bobbitt for defendant.

ADAMS, J. It is familiar learning that an easement may be acquired by grant, prescription, or dedication. *Milliken v. Denny*, 141 N. C.,

224. The plaintiff asserted his acquisition of an easement in the alley both by prescription and by dedication and tendered issues addressed to each of these methods. The judge submitted the issues appearing of record and directed a verdict for the defendant, and the appeal presents the question whether there is any evidence to sustain the plaintiff's contention.

At common law a right to an incorporeal hereditament may be obtained and secured by use and possession when exercised under a claim of right, if open, peaceable, and adequately continuous; and out of this mode of acquisition was developed the doctrine of "lost grant." A sufficient lapse of time raises a presumption that there must originally have been a grant from the owner to the claimant. It is conveniently designated a "lost grant," not because the original is of primary importance, but to avoid the rule of pleading requiring profert. Ordinarily, however, if the origin of the easement is known a lost grant will not be presumed. *Davis v. Ramsey,* 50 N. C., 236; *Claflin v. Albany,* 157 Mass., 489; *Boyce v. Railroad,* 58 L. R. A. (Mo.), 443; 19 C. J., 873, sec. 18.

The first reference to the alley disclosed by the record evidence is found in the deed from Joseph E. Falls to George M. Messer, dated 10 January, 1894. This deed was made subject to the right of way to and over the rear alley described in the agreement between Osborne, Messer, and Berryhill and conferred upon the grantee the right to use the alley in question in common with the grantor, his heirs and assigns. All the provisions in regard to the use of this alley were apparently intended for the parties to the several deeds and those in privity with them. We are not inclined to hold that these deeds *per se* imposed an easement upon the defendant's lot for the benefit of the public, but there is at least more than a scintilla of evidence that the first public use of the alley began before the execution of the deed from Falls to Messer, and thence continuously extended over a period of more than thirty years. If this evidence be accepted there is ground for the plaintiff's contention that the deeds are not the origin of the alleged easement and that the "lost grant" doctrine is not precluded.

In addition the plaintiff contends that there is evidence of dedication. We are not inadvertent to the general principle that where the owner of land constructs a road on it for his own convenience, the mere permissive use thereof by the public will not show a dedication of it to the public use, for as *Judge Pearson* remarked in *Davis v. Ramsey, supra,* every person who chooses to do so takes the liberty of traveling over every private road in the country; but, as we have intimated, the question of dedication is not necessarily to be determined by the provisions in the

deeds. Dedication may be either by express language, by reservation, or by conduct showing an intention to dedicate.

Whatever the nature of the act the general rule is that the intention, actual or constructive, must also exist, but such intention may be manifested by acts as well as declarations. The principle is clearly stated by *Mr. Justice Hoke* in *Tise v. Whitaker,* 146 N. C., 375: "It is well understood with us that the right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well considered decisions." *Milliken v. Denny, supra; Kennedy v. Williams,* 87 N. C., 6; *Boyden v. Achenbach,* 79 N. C., 539; *Crump v. Mims,* 64 N. C., 767; *Moore v. Meroney,* 154 N. C., 158; *Supervisors v. Comrs.,* 169 N. C., 548; *Land Co. v. Murphy,* 179 N. C., 133; *Haggard v. Mitchell,* 180 N. C., 255.

With reference to acceptance of the alley by the public authorities the city engineer said: "The city never worked the alley and exercised no control over it in reference to street work or working in the alley, but did exercise sanitary control over it." To what extent such sanitary control was exercised does not definitely appear. It may or may not have been such control as indicated an acceptance or a recognition by the city of the public use of the alley.

An extended discussion of the evidence is neither necessary nor desirable; but, without concluding as an essential inference of law that the plaintiff is entitled to an easement in the alley as appurtenant to his deed, after a critical examination of the record, we think the circumstances require that the questions of prescription and dedication be referred to the determination of the jury. The cause is therefore remanded for a

New trial.

STATE v. W. N. O'NEAL.

(Filed 22 January, 1924.)

1. **Criminal Law—Intoxicating Liquor—Witnesses—Defendants—Constitutional Law—Incrimination.**

A defendant in a criminal action by becoming a witness in his own behalf, acknowledges the right of the prosecution to test his credibility, and waives his constitutional privilege not to answer questions tending to incriminate him or to prove the specific offense with which he is charged.

2. **Same—Cross-Examination.**

Where upon denial of the criminal offense of the unlawful sale of spirituous liquor, the defendant takes the stand as a witness in his own behalf, he may be cross-examined as to any circumstance of probative value to show his opportunity for the manufacture and possession of the intoxicating liquor.

3. **Same—Evidence—Character.**

Where the defendant's witness has testified as to the defendant's general character in a criminal action for the unlawful sale of intoxicating liquors that he had heard the defendant's character discussed by blockaders, etc., upon the trial of others for a like offense, it is incompetent for the defendant to show by this witness that the defendant had been active to destroy the liquor business in this locality, as an attempt to show a particular trait of character on a matter of general reputation, though the witness of his own volition may have so qualified his testimony as to general reputation.

4. **Criminal Law — Intoxicating Liquor — Witnesses — Detectives — Interest—Instructions—Special Requests for Instructions—Appeal and Error—Objections and Exceptions.**

In the absence of a special request for instruction it is not reversible error under C. S. 564, for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case.

CRIMINAL ACTION tried by *Cranmer, J.*, at March Term, 1923, of WAKE.

The defendant was convicted of the unlawful sale of spirituous liquor, and from the judgment he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Womble & Dodgen, Johnson & McMahon, and Bart M. Gatling for defendant.

ADAMS, J. As a witness for the State W. E. Nicholson testified that he was a detective employed to discover and report breaches of the

prohibition law; that on 18 January, 1923, he went to the defendant's home to purchase liquor and the defendant said he had none then but had bought and mashed fifty-eight crates of grapes and would notify the witness when he had "made the run"; that soon thereafter he told the witness he had brandy in kegs, and two days later sold him three half-gallon jars of it at the price of thirty dollars. The witness further testified that he had previously bought from the defendant four and a half gallons of corn whiskey. He was corroborated by his brother S. O. Nicholson.

The defendant, testifying in his own behalf, excepted to evidence brought out by the State on his cross-examination tending to show that officers had searched his premises two or three times within the two years next preceding and had found there two stills and a quantity of beer. We think the evidence excepted to was properly admitted.

Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to all the disadvantages of that position. In doing so he acknowledges the right of the prosecution to test his credibility and he waives his constitutional privilege not to answer questions which tend to incriminate him or to prove the specific offense with which he is charged. *S. v. Efler,* 85 N. C., 585; *S. v. Allen,* 107 N. C., 805; *S. v. Simonds,* 154 N. C., 198.

The defendant denied the alleged sale and said that he had never seen either of the Nicholsons before the trial. The traverse raised a plain issue of fact and it was clearly the right of the State by the cross-examination to elicit any circumstances of probative value tending reasonably to show the defendant's opportunity for the manufacture and possession of whiskey or brandy. It is a familiar principle that whenever the doing of an act by a particular person is material or relevant such person's opportunity to do the act also is relevant, and it is not necessary to show that his opportunity was exclusive. Wigmore on Evidence, sec. 131. The defendant disclaimed responsibility for the beer and the stills, it is true, but the credibility of his testimony was a matter for the jury.

After Dennis Davis, a witness for the defense, had testified to the good character of the defendant, the defendant's counsel asked him these questions:

"Q. You say you have only heard his character discussed by blockaders and people of that character? A. 'Yes.'

"Q. Why do you make that statement? A. 'Over in Granville they convicted fifteen men at a time of blockading and I heard his name mentioned then.'

"Q. Do you know anything about his (defendant's) activities in that section trying to destroy the liquor business? Objection by State; sustained; exception.

"The witness would have stated that the defendant had reported blockaders and furnished evidence against them to the officers."

The admission of the excluded evidence would have violated the principle that the party offering a witness may not evoke single instances or particular circumstances to prove such party's general character. A witness may not be examined as to any particular trait of character on a matter of general reputation, although of his own motion he may qualify a general statement, and "in no case either on direct examination or on cross-examination can a witness be asked to testify to particular acts." *S. v. Melton,* 166 N. C., 442. See, also, *S. v. Pearson,* 181 N. C., 588; *S. v. Neville,* 175 N. C., 731, 735; *S. v. Hairston,* 121 N. C., 579.

The principal witnesses for the State were W. E. Nicholson and S. O. Nicholson, who admitted that they were detectives employed and paid to get evidence against persons unlawfully dealing in liquor. The defendant contends that as his Honor instructed the jury to scrutinize the testimony of the defendant and his relatives, he should have given a similar instruction with regard to the testimony of the detectives. If the defendant had submitted a written request for it such instruction should have been given (*S. v. Black,* 121 N. C., 578), but he admits he did not do so; and the question is whether in the absence of such request the failure to give such instruction constitutes reversible error. In *S. v. Smith,* 183 N. C., 725, 729, there is an intimation that such request is essential; and in *S. v. Boynton,* 155 N. C., 457, 464, concerning the defendant's prayer that the testimony of a detective should be scrutinized with unusual caution the Court said: "These prayers have been upheld and almost in this exact language by courts of approved authority, but usually there were facts *ultra* tending to impeach the testimony of the witness, and in one of them, certainly, the detective was shown to have a pecuniary interest in the result of the verdict; and it was no doubt in reference to these facts that the prayer was approved, and not with a view of establishing any hard and fast formula as to the evidence of detectives."

The statute, it is true, requires the judge plainly and correctly to state the evidence and to declare and explain the law arising thereon (C. S., 564), and this requirement has been construed as implying that on all the substantive features of a case a correct charge must be given without regard to a special prayer, but as to subordinate features or particular phases of the evidence a litigant who desires special explanation should make proper request for appropriate instructions. *S. v.*

Thomas, 184 N. C., 757; *S. v. Merrick,* 171 N. C., 795; *S. v. Davidson,* 172 N. C., 944; *S. v. Fulford,* 124 N. C., 798; *S. v. Groves,* 119 N. C., 822; *S. v. Varner,* 115 N. C., 745; *S. v. Bailey,* 100 N. C., 528.

Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction. See *S. v. Holland,* 83 N. C., 624. The principle controlling the decision in *Real Estate v. Moser,* 175 N. C., 259, and in *Butler v. Mfg. Co.,* 182 N. C., 547 is distinguishable from that which is applicable to the exception under discussion.

Upon a review of the record we find

No error.

CAROLINA AUTOMOTIVE TRADE ASSOCIATION ET AL. v. W. O. COCHRAN, SHERIFF OF MECKLENBURG COUNTY, ET AL.

(Filed 22 January, 1924.)

Taxation—Licenses — Automobiles — Principal and Agent — Vendor and Purchaser.

State agencies for the sale of automobiles and motor trucks are required to pay a license tax of $500, which includes all employees at the headquarters of the business in this State. Subagencies operating at a separate place of business other than such headquarters are required to pay a license tax of $5 for each subagency, which includes all employees thereat who do not make or solicit sales outside of their respective locations, but not to outside salesmen. The latter are required to carry with them a duplicate license, at a cost of $5 to each one, to show their authority to sell under license issued to their headquarters. Sections 22 and 78, chapter 4, Laws 1923.

THIS is a petition to rehear this case in which the opinion, 186 N. C., 159, was filed at this term, 3 October, 1923.

C. A. Cochran and John M. Robinson for plaintiffs.

Attorney-General Manning and Assistant Attorney-General Nash for defendants, respondents.

CLARK, C. J. The petition to rehear is not based upon any allegation of error in the opinion filed, but upon the ground that the opinion "failed to determine one of the vital questions raised in the record."

The petition alleges that this action was instituted for the purpose of contesting the ruling of the Commissioner of Revenue in two particulars, to wit:

(*a*) Collection of a special $500 license tax for the sale of passenger cars and a separate one for the sale of trucks, though both are made by the same manufacturer and sold under the same name;

(*b*) The requirement of the Commissioner of Revenue that each individual salesman employed either by the State agent or by a local dealer, take out a separate certified duplicate of the $500 license referred to on payment of $5.

The petitioners admit that the opinion heretofore filed passed upon the first question above indicated and as to that no rehearing is now sought, but aver that the Court failed to pass upon the second and seek to have the Court now to make a clear and distinct ruling upon this second point.

Judge Harding in the judgment rendered in this case ordered that, "The said commissioner is also enjoined and restrained from demanding or requiring that any one who has obtained the said $500 license, or the duly appointed agent of such holder procure and pay for a separate certified duplicate thereof, for each individual salesman employed either by the holder of said license or by the duly appointed agent of such holder; or from making such demand directly upon such salesman.

In our former opinion the Court said: "The statute intends that only the person paying the $500 license tax is entitled to have a certified duplicate issued to his agent upon the payment of $5.00. The payment of this $500 for the whole State covers all automobiles—or all auto trucks—but not both—manufactured by the same factory, under the same name, irrespective of the peculiar styles of the automobile or of the truck."

It seems that the question now presented arises from the fact that both the State agent and the local dealer maintain organizations for the sale of automobiles, or of trucks, and that each person in the organization is essentially engaged in the business of selling automobiles. For instance, a mechanic in the shop sells an automobile when he can; so does the bookkeeper and so does any other member of the force. It would be difficult, it is alleged, to go to any organization and designate any particular members of it as salesmen. The petitioners allege that subsequent to the decision heretofore rendered the Commissioner of Revenue has sent out a demand that each individual salesman employed by either a State agent or a local dealer obtain a certified duplicate certificate. This as we understand it, is the matter upon which a fuller ruling is asked by this rehearing.

Section 94 of the statute provides: "It shall be unlawful for any person, firm, or corporation to carry on any business or practice any profession, for which a license is required by this act, without having a special tax license therefor posted in a conspicuous place at the place where such business is carried on. This does not apply to any license under which a person operates outside of his place of business; and if the business that is made taxable is carried on at two or more separate places, a separate license for each business shall be required. Any person violating the provisions of this section shall be liable for a penalty of $25."

This section requires the holder of the $500 license to post it in a conspicuous place where such business is carried on and this is a protection to all persons doing business in that particular place. But if the holder of the license attempts to do business outside of his place of business or at a separate place he must have a duplicate license for such business. If, therefore, a dealer in automobiles, or trucks, in this State himself pays the tax of $500 he should post that license at his place of business and it is a full protection to all his servants and agents acting for him at that particular place. If a manufacturer out of the State pays this $500 license tax and appoints a particular person, firm, or corporation as State agent, and permits such person, etc., to post this $500 license in this place of business, that would be a protection to his servants and agents conducting the business at such place.

The requirement in regard to duplicate licenses applies to two classes of agents: (a) A traveling agent who travels out from the place of business of the original licensee, taking orders for automobiles which said licensee is authorized to sell; (b) Agents located in a place other than that in which the original licensee does business.

To the first class sec. 95 of the Revenue Act applies as follows: "It shall be unlawful for any person to carry on or practice any itinerant trade, business, or profession for which a license is required under this chapter without having in his actual possession at the time of so carrying on or practicing said trade, business or profession, said license or duplicate thereof. No officer required to issue license under this act shall have authority to issue a duplicate of any license unless expressly authorized to do so by this chapter, but each person, firm, or corporation shall be required to take out a separate license for each agent. Any person violating the provisions of this act shall be guilty of a misdemeanor." These traveling agents must necessarily carry the duplicate licenses about on their person and have it in their actual possession when attempting to make a sale.

The second clause of sec. 95 applies to agents acting in a business located at other place than where the $500 license is required to be

posted. The Commissioner of Revenue has interpreted this provision in connection with secs. 22 and 78 of the Revenue Act which requires duplicate licenses to be issued, not to the corporation with a number of employees, but to the individuals who are to act as agents and salesmen of the licensee who travel for him and to sub-agents at another place. We think the Commissioner of Revenue is correct. The authority to sell under these duplicate licenses is a personal privilege, nontransferable, and according to the express terms of sec. 95, a separate license is required to be taken out for each agent.

That is to say that each traveling agent or "drummer" is required to take out a duplicate license as a proof that he is authorized to sell and where there is a local agency at a place other than the headquarters, so to speak, of the State agency, duplicate license must be taken out for such location which will protect all the persons and agents at that place.

In *S. v. Morrison,* 126 N. C., 1123, the Court held in regard to the Revenue Law of 1899, which imposed a license tax upon the business of selling pianos or organs, as follows: "The sole question arising upon the special verdict is whether such license protects only the person or agent who has it in possession, or an unlimited number of agents."

In that case E. M. Andrews & Company were licensed to sell pianos, but they had their principal place of business in Charlotte. The defendant Morrison was one of their agents who sold pianos in Lincoln County and the Court held that he was not protected by the license to Andrews, although he was acting as agent to Andrews, but that he must himself have a license with him, holding that the Legislature intended that the $10 license authorized only the person having it in his possession to sell. The Court said: "Such has always been the policy of the law except when the statute authorized the issuance of certified duplicates of copies of the license." The Court evidently means by this that in such cases instead of having the original license with him, he must have a duplicate license—which in this instance is issued on payment of $5.

The ruling of the Revenue Commissioner, as we understand its meaning on the point in question, is affirmed. The costs of the petition will be paid by the petitioners.

Petition dismissed.

W. A. GENTRY ET AL. v. C. C. GENTRY.

(Filed 22 January, 1924.)

1. Evidence—Nonsuit.

Upon a motion to nonsuit, the evidence is considered in the light most favorable to the plaintiff.

2. Tenants in Common—Adverse Possession—Outstanding Title—Trusts.

Where the original enterer upon State's lands has acquired the right to a grant of land which has not been issued to him, and after his death his son remains in possession and continuing to claim under him, obtains the grant in his own name, pays the taxes, etc.: *Held*, his possession is that of a tenant in common with the other heirs at law of the deceased ancestor under whom all claim, and the possession under the outstanding title he has thus obtained cannot operate for his exclusive benefit.

3. Same—Limitation of Actions—Statutes—Possession—Ouster.

Where one tenant in common in possession has obtained for himself the outstanding title to the *locus in quo*, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession, C. S., 445, in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action.

4. Same—Evidence—Questions for Jury.

Where a tenant in common in possession has declared that he was holding the possession for the benefit of all, the evidence is sufficient to take the case to the jury.

5. Same—Deeds and Conveyances—Sale—Proceeds.

Where a tenant in common in possession has acquired the outstanding title and has sold the land, the principle upon which equity impresses a trust on the land for the benefit of the cotenants is applicable to the proceeds of the sale so made.

CIVIL ACTION, tried by *Lane, J.*, at April Term, 1923, of CHEROKEE. Nonsuit, and appeal by plaintiffs.

The plaintiffs alleged that in 1854 James W. Blackwell obtained a certificate of survey on Entry No. 4024 for land on Tellico River, known as the Freeman place, and gave to the State certain bonds payable in one, two, three, and four years, with W. S. Gentry as surety; that Gentry paid the bonds and under the Cherokee Land Law then in force became entitled to a grant for said land; that he acquired a deed for the land from Blackwell; that about the beginning of the war he took charge of the land, used it and built a cabin on it, and claimed it continuously until his death in 1865 or 1866; that after his death his widow, and the defendant for her, listed the land for taxation as the property of Gentry's heirs and paid the taxes until her death, after which the defendant listed the land in the same way until 1900, when

he procured a grant for the land from the Secretary of State. They allege that the defendant never claimed the land until he received his grant and that W. S. Gentry's title matured through possession before 1900; that about that time the defendant fraudulently procured the register of deeds of Cherokee County to issue a certificate that Blackwell and others had paid for the lands covered by said entry, knowing that W. S. Gentry had made such payment, and moreover fraudulently wrote out an assignment of the entry to himself and antedated it 16 February, 1886; that he could not take a grant in his own name while holding the land for the estate; and that he contracted to sell it in 1909, and under a decree for specific performance executed a deed to the purchaser in 1916.

The plaintiffs ask that the defendant be declared a trustee for them and required to pay to each one-seventh of the purchase money.

The defendant denied the material allegations of the complaint and alleged that his grant was issued on 7 February, 1900, upon assignment of Blackwell's certificate and recorded on 20 February, 1900; and that in 1909 he contracted to sell the land to D. W. Swan, whose assignee brought suit for specific performance on account of a dispute as to the number of acres, and made a conveyance to the purchaser on 25 July, 1916. He also pleaded the ten-year and the twenty-year statute of limitations. At the close of the plaintiffs' evidence the action was dismissed as in case of nonsuit.

John H. Dillard and Thomas J. Hill for plaintiffs.
M. W. Bell and J. N. Moody for defendant.

ADAMS, J. If accepted in the light most favorable to the plaintiffs the evidence shows the following facts: In 1854 James W. Blackwell entered a tract of vacant land on Tellico River in Cherokee County, known as the Freeman land, and in the same year, (one witness said in 1864 or 1865) without obtaining a grant, executed his deed therefor to W. S. Gentry, the father of the plaintiffs and the defendant. Near the beginning of the Civil War W. S. Gentry built a cabin on the land and put a tenant in it, who remained there ranging stock until the end of the war, and exercised other acts of dominion over the land until his death. He died in 1864, and his widow and the defendant then had charge of the land until her death which occurred in 1885 or 1887, listing it for taxation and annually paying the taxes thereon. The defendant, repeatedly admitting that the land was his father's, said that the deed from Blackwell had been misplaced, lost or burnt and that he was going to get a release or quit-claim from the grantor, sell the land, and distribute the proceeds when collected among the heirs at law.

At the date of his contract with Swan in 1909, and even after he had been sued for specific performance, he recognized their interest in the land and in the proceeds, if a sale should be effected. In 1900 he obtained a grant for the land upon a purported assignment of Blackwell's certificate of survey, the validity of which the plaintiffs denied. On 25 July, 1916, the defendant in consideration of $1,962.49 conveyed the land to Swan's assignee, and in 1922 the present suit was commenced.

This Court has recently emphasized the principle that the plaintiff's right to impress a trust upon the proceeds arising from the defendant's sale of the land is dependent upon the question of their right to impress such trust upon the title acquired by the defendant under his grant. If he held such title to the land in trust he likewise held in trust the proceeds arising from the sale. *Little v. Bank of Wadesboro, ante,* 1. It becomes necessary, therefore, to determine the legal relation of the parties at the time the grant was issued. Whether W. S. Gentry and his heirs acquired title by possession under the Blackwell deed as color, we need not inquire, because the evidence tends to show that after Gentry's death his heirs (including the defendant, of course) claimed under him, and while asserting such claim they were precluded from denying his title. *Collins v. Swanson,* 121 N. C., 67; *Alexander v. Gibbon,* 118 N. C., 796; *Christenbury v. King,* 85 N. C., 230; *Johnson v. Watts,* 46 N. C., 228; *Thomas v. Kelly, ibid.,* 375. It appears then that the parties, as heirs of W. S. Gentry, claimed to be tenants in common of the land when the defendant obtained his grant. Did the grant change this relation?

Subject to certain exceptions there is a general rule that confidence characterizes the relation of cotenancy to such extent that while the relation exists it precludes one of the cotenants from purchasing, for his exclusive benefit, an adverse or outstanding claim of title. *Chief Justice Pearson* stated the principle in this language: "There is a fellowship between tenants in common. The law assumes they will be true to each other; the possession of one is the possession of all, and one is supposed to protect the rights of his cotenants and is not tolerated in taking an adversary position unless he acts in such manner as to expose himself to an action by his fellows on the ground of a breach of fealty; that is an actual ouster." *Day v. Howard,* 73 N. C., 4. "If one of several tenants in common should buy in an outstanding title affecting the common property, equity will declare him to have purchased for the benefit of the others." *Saunders v. Gatlin,* 21 N. C., 92. "The general rule is well settled that one cotenant cannot purchase an outstanding title or encumbrance, affecting the common estate, for his own exclusive benefit, and assert such right against his cotenants." *Jackson*

v. Baird, 148 N. C., 29. See, also, *Woodlief v. Woodlief,* 136 N. C., 138; *McLawhorn v. Harris,* 156 N. C., 111; *Smith v. Smith,* 150 N. C., 81; *Troxler v. Gant,* 173 N. C., 425; *Everhart v. Adderton,* 175 N. C., 403, 406; *Ruark v. Harper,* 178 N. C., 252; Note, 19 L. R. A., N. S. 591; Note, 37 L. R. A., N. S. 831.

The evidence, if true, shows the defendant's avowed purpose to hold the title obtained under his grant for the benefit of all the heirs and to pay to each his proportionate part of the proceeds derived from the sale to Swan's assignee, and under these circumstances we must hold that there was evidence from which the jury might have inferred that the relation of cotenancy existed, and that it was admitted by the defendant as late as 1916. If this contention is sustained the cause is not barred by the statute of limitations. We have held that an action to have a party declared a trustee is barred by the lapse, not of three, but of ten years. C. S., 445; *Sexton v. Farrington,* 185 N. C., 339; *Little v. Bank, supra.*

As we are required to do in an appeal from a judgment dismissing the action as in case of nonsuit, we have treated the appeal as if the circumstances relied on by the plaintiffs were fully established. When the facts are developed upon the trial the jury may reject the plaintiffs' contention entirely but we think the evidence as disclosed in the present record should have been submitted to the jury, and to this end the cause is remanded to the lower court.

Error.

STATE v. GEORGE LOVE.

(Filed 22 January, 1924.)

1. Homicide—Criminal Law—Evidence Excluded—Instructions—Appeal and Error.

Where a prisoner was tried for and has been convicted of murder in the first degree, and there was conflicting evidence that he acted in self defense, and further that he had acted premeditatedly and with prior malice, it is reversible error for the trial judge to state as a part of the State's contentions certain evidence as to the prisoner's long continued prior malice he had excluded as too remote; and this error is not cured by a further instruction that the law would attribute the motive of the killing to the present provocation and not to preëxisting malice unless it so appeared from the circumstances.

2. Same—Constitutional Law.

In an action involving the crime of murder in the first degree, an instruction that refers to a pregnant circumstance to show the previous malice and subsequent premeditation of the prisoner to commit the act,

as a fact sworn to but which had been excluded from the evidence, is reversible error in denying to the prisoner his constitutional right to confront the witnesses against him, and to submit them to his cross-examination. Constitution of North Carolina, Art. I, sec. 2.

3. Same—Contentions—Objections and Exceptions.

The rule that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner upon the trial, that had been excluded, tending to show previous malice of the prisoner, vitally necessary upon the question of his premeditation.

CLARK, C. J., dissenting.

INDICTMENT for murder tried before *Lane, J.*, at February Term, 1923, of HAYWOOD.

Defendant was indicted for the murder of William Brock deceased, and on issues joined and evidence offered there was a verdict of guilty of murder in the first degree, judgment, and prisoner excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. W. Ferguson and Frank Carter for prisoner.

HOKE, J. There was evidence on the part of the State tending to show that on Saturday night 13 January, about 10 o'clock, the prisoner followed the deceased going to his home along Pigeon Street in Waynesville, N. C., and at a point not far beyond Shelton Branch, on said street, shot and killed the deceased and that such killing was deliberate and premeditated, and from ill-feeling long harbored by the prisoner towards the deceased. There were also facts in evidence permitting the inference that the homicide was not a premeditated murder, but that deceased, going along the street some distance ahead, turned and came on the prisoner with a threatening exclamation and attitude and the prisoner shot and killed deceased on this sudden and unexpected meeting. It was proved that the fatal shot entered the front just above the heart, ranging back through the body. One R. A. Teague, a witness for the State, testified that he owned a store on Pigeon Street not far from the Shelton Branch; that Brock, the deceased, lived further out on said street beyond a colored settlement, and that George Love lived in said settlement some distance off Pigeon Street; that the ordinary place for George to leave Pigeon Street was just beyond the Shelton Branch, and that the homicide occurred a short distance beyond this, but there were other ways for him to leave Pigeon Street further on. That on the night of the homicide witness was in his store at 10:00

o'clock p. m., just about his closing time; deceased was in the store sitting by the stove when the prisoner came in, bought a few things, inquired if his wife had bought their groceries yet, and asked witness if she had not done so could he get them in the morning; that a few seconds after prisoner entered Brock left, going towards his home, and soon after the prisoner left; that witness, standing in his doorway, could see the two going along Pigeon Street, the one about twenty-five or forty feet behind the other, and he saw them until they passed out of the light from two street lamps near the branch into the shadow; that witness then turned and hearing two shots looked out again and saw one of them coming back into the light, staggering, and fell—this proved to be the deceased Brock, fatally shot as stated. With a view of showing that this was a deliberate and premeditated murder the State introduced a witness by the name of Will Gaddy, who testified that in July or August preceding the homicide, witness and deceased were sitting in front of a hardware store in Waynesville and prisoner walked by and turned, looking at the deceased. Two, three, or four minutes later Brock moved off and witness, having moved up near, and heard him say to another colored boy who was with him, "Yes, I will get the God-damned son of a bitch sooner or later." In support and corroboration of this position, the State later in the trial, proposed to prove by a witness Jim Smith that 30 months before the homicide, when deceased had made a serious assault on the old father of the prisoner, the latter was heard to use language about the deceased applying to him the same epithets and showing a deadly animosity towards him, the jury having been sent out to allow a discussion of the question, the court ruled that the proposed evidence was too remote and both the circumstance of the assault and the prisoner's language concerning it was excluded. In his charge to the jury, however, the court, in stating the claims and contentions of the State that this was a wilful and deliberate homicide, from a settled and long-cherished malice felt by prisoner towards the deceased, stated and referred to the fact that 30 months before the deceased had had trouble with the father of the prisoner in the course of which deceased had knocked down the older Love." To the statement and reference thereto prisoner duly excepted and, in our opinion, the exception must be sustained. Here was a prisoner on trial for his life and the sole question was: "Was this a deliberate murder prompted by malice long harbored towards the deceased, or was it a homicide on a sudden meeting and from an instantaneous impulse, and permitting also suggestions of a killing in self-defense? And on an issue of this supreme import, after excluding the proposed testimony of a serious assault by deceased on the witness' aged father 30 months before as being too remote, puts it to the jury

as a fact in evidence to show the origin of the prisoner's malice and as tending to support the State's contention that this was murder done of a deliberate and settled purpose. And when coupled, as it was in this portion of the charge, with the threat proved by the witness Gaddy that within six months before the prisoner was heard to say, supposedly of the deceased, "I will get the God-damned son of a bitch sooner or later," the fact of this fight with the father became of tremendous significance as tending to show an abiding malice towards the deceased, and its statement in the hearing of the jury after it had been excluded, should undoubtedly be held for reversible error. True, this feature of the charge was prefaced by the statement that it is the contention of the State, and we have numerous decisions to the effect, that if the court, in stating the contentions, commit an error, it is too late to except to it after verdict—but while the deduction from the facts was given as a contention of the State, the putting of the fact before the jury as sworn testimony where it had been excluded was the act of the judge and of a highly prejudicial kind and none of the decisions referred to go to the extent of disallowing an exception under such circumstances. Suppose the counsel for the prisoner had excepted and on discussion the judge had withdrawn the evidence referred to, this would only have served to emphasize the error and strengthen the lodgment it had necessarily made on the minds of the jury. Like an expression of opinion by the Court on the merits of the case, the harmful impression could not well be effaced, and in our opinion, should not be taken as waived because not presently excepted to. See *S. v. Cook,* 162 N. C., 586, and cases cited. Again it is insisted, for the State, that the evidence referred to in this portion of the charge is competent and therefore no harm has come to the prisoner in referring to it, but if this be conceded, in that aspect of the matter, there is error for the fact objected to was put before the jury in such a way and under such circumstances that gave the prisoner no opportunity of disproving it or cross-examining the witness who testified to it, it therefore violated the constitutional right of the prisoner to be confronted with the witnesses against him. The right of a defendant charged with crime to know the nature of the charge and to confront his accusers and the witnesses against him, has prominent place in our State Constitution, Article I, section 2, and appears also as the sixth of the first ten amendments adopted to the Constitution of the United States, and is universally recognized as of vital importance to the administration of well-ordered justice. *S. v. Dixon,* 185 N. C., 727; *S. v. Dowdy,* 145 N. C., 432-436. Speaking to the question in *S. v. Dowdy,* the Court said: "This right, of such supreme importance to the citizens, so essential to any proper and impartial administration of justice, should appeal most impressively to

the courts of this State, for North Carolina declined to adopt the Federal Constitution until the amendment by which it was guaranteed had been formulated by the Federal Congress and its adoption practically assured. It has, too, prominent place in our Bill of Rights, and this Court would never uphold or countenance any legislation or procedure by which it was destroyed or substantially impaired." Again it is contended, for the State, that the error, if any, is cured by the following which appears as a part of his Honor's charge: "If the jury shall find from the evidence that the prisoner had ill-feeling and malice towards the deceased and had formerly threatened the deceased, and if the jury shall further find from the evidence that the parties met accidentally upon the occasion of the fatal encounter and that the deceased suddenly advanced upon the prisoner, cursing him and threatening to 'fix him,' or words to that effect, and that the prisoner instantly thereupon shot and killed the deceased, the law would attribute the motive of the killing to the present provocation and not to the preëxisting malice, 'unless it so appeared from the circumstances of the affair.'" But this amounts to no more than an admonition to the jury to adopt the theory of a killing on a sudden impulse from present circumstances rather than attribute it to an antecedent malice, for the closing part of the charge "unless it so appears from the circumstances of the affair" clearly leaves to the jury whether the matter be decided one way or the other. This but adds to the significance of the error complained of in putting before the jury a fact of pregnant significance on that question, which had not been testified to by any witness.

For the error indicated the prisoner is entitled to have his cause heard before another jury, and it is so ordered.

New trial.

CLARK, C. J., dissenting: The prisoner was indicted and convicted of murder in the first degree of killing a white man. It is not controverted that there was ample evidence before the jury, if believed, to justify the verdict. The exception on which a new trial is asked is based upon the following facts: There was evidence that six months before the homicide the prisoner, in July or August of last year, when the deceased passed by him, said to a bystander and looking at the deceased, "I will get the God-damned son of a bitch sooner or later." There was evidence offered by the State that in the summer of 1920 there had been a previous difficulty between the father of the prisoner and the deceased, and that the prisoner had made a similar threat two years and a half before the trial, but the court had excluded it.

In the charge to the jury the court stated the contentions of the State, and among the contentions of the prisoner he said: "It is con-

tended that any trouble that may have occurred between Brock (the deceased) and Love's father had been thirty months before, and that George Love had nothing to do with it." Neither the prisoner nor the State made any exception to this recital at the time nor until after verdict.

It has been stated, too often to be now departed from, that any error in stating the contentions of the parties must be excepted to at the time, and if this is not done an exception cannot be taken after verdict. The following are a few among the very many cases that "an objection to the court's statement of the contentions of the parties cannot be first made after verdict": *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633; *Phifer v. Comrs.,* 157 N. C., 150. "If a judge states a certain condition of affairs as being contended for by a party, when there is no evidence to support the contention, it is the duty of counsel to call the court's attention thereto." *Jeffress v. R. R.,* 158 N. C., 215.

This ruling that a failure to call the attention of the court, at the time, to any alleged error in stating the contention of the parties waives the objection, has been so often held, and it is so entirely without an exception, that it is unnecessary to cite the numerous and unbroken precedents which sustain the self-evident requirement in the due and just administration of the law. The courts cannot be governed by sentimental considerations urged by counsel who have lost out before a jury upon evidence and a charge not excepted to.

This is a plain, practical, well-settled rule of action.

The party who thinks himself prejudiced by any inadvertence or error in stating the contentions should make the exception at the time, and if he does not do so, it must be taken that he did not think himself prejudiced thereby, and if he does not do so at the time, so the judge can correct it, he will not be allowed to make an exception after verdict. To permit this would be eminently unfair to the State. The opportunity should be given the judge to correct an inadvertence (for such it must be) at the time, and if not, it must be taken that all exception was waived. This has been the uniform ruling of the Court, made uniformly and without any exception whatever, and should not now be departed from and for the first time in favor of this defendant. Upon the review of the whole evidence in this case, it would seem very clear that it could not possibly have had any effect upon the jury. If it had, notwithstanding that the failure to except had waived objection to the inadvertence, it is very certain that on an appeal to the presiding judge, who knew all the facts and circumstances much better than can be presented here, in the interest of justice, he would have set aside the verdict.

Upon the face of this record it seems clear that the jury had the whole case fairly and fully presented to them by his Honor's charge and have found their verdict upon ample evidence.

It is to the interest of justice that new trials should not be granted for immaterial matters or inadvertences which it is not shown could have had any effect upon the result.

The American Bar Association, headed by the *Chief Justice* of the United States, has issued a statement asking for more efficiency in the administration of justice, and nothing can more militate against this than the granting of new trials upon any inadvertence, or matters like this, which the counsel at the time did not deem was of sufficient importance to ask the court to correct, and which it must be taken that he would have promptly done if asked.

As an evidence of the insecurity of life in this country, caused by the granting of new trials or acquittals upon technical or merely sentimental reasons, it is pointed out that last year in the United States there were 15,000 homicides, and in this State in 1921 there were 246 according to the Bureau of Vital Statistics, and in 1922 there were 253, while in Great Britain, with 40 millions of people, there were less than 40. Indeed in 1922, as stated in the official report, of which we take judicial notice, it is returned that "in this State there were 298 deaths from typhoid fever and 253 homicides, and that while disease had decreased crimes had increased."

We know that as a matter of fact that so great is the dissatisfaction with the numerous new trials and miscarriages of justice, due to acquittals or new trials based often upon mere technicalities, crime has so much increased in this country that secret and unlawful organizations pervade the country and State to a large extent, and it is not inappropriate, but timely, that the courts should take notice of the warning of the American Bar Association and the *Chief Justice* that there is an "alarming and steadily growing disrespect and, indeed, hostility to the courts." These secret organizations for the protection of society can have as their cause only the apprehension of the public that the great and increasing volume of crime is due to the inefficiency of the courts, caused largely, if not altogether, by yielding to the importunities of counsel claiming every technicality as a defense, when, upon the law and the facts, the jury have found, beyond a reasonable doubt, that the defendant is guilty.

In this case the facts were fully developed, the prisoner was ably defended, and the inadvertence in stating a contention, which would have been corrected if called to the attention of the judge, should not be allowed, in my humble judgment, to give this prisoner a new trial where, upon the evidence, under a charge unexcepted to, the jury have

found that beyond a reasonable doubt the prisoner was guilty of felonious, malicious and premeditated murder.

Crime should be repressed by the orderly process of the courts and by the certainty of the infliction of punishment when the crime has been duly ascertained by the verdict of the jury, but society must be protected, and if the courts fail to do so we may expect the continuance of the lawless process by which the public may, and will, deem it necessary to protect themselves when the courts do not do so.

Homilies upon the evil effects of the repression of crime by secret and unlawful bodies of men will have no effect. The only remedy is the efficient and common-sense enforcement of the law by the courts, which are provided and supported at the expense of the public for the sole purpose that by the legal repression of crime, life and property may be made safe.

Among the many opinions which, without a single exception cite, approve and repeat the proposition that if the court recites the evidence or the contentions of the parties incorrectly, any objection must be made at the time so as to give the judge opportunity to correct it, and that otherwise the objection is waived, the following are the latest cases: *S. v. Cox,* 153 N. C., 638; *S. v. Blackwell,* 162 N. C., 684; *S. v. Fogleman,* 164 N. C., 461; *S. v. Cameron,* 166 N. C., 384; *Ferebee v. R. R.,* 167 N. C., 296; *Barefoot v. Lee,* 168 N. C., 90; *Lea v. Ins. Co., ibid.,* 478; *Ball v. McCormack,* 172 N. C., 682; *McMillan v. R. R., ibid.,* 853; *S. v. Merrick, ibid.,* 872; *S. v. Johnson, ibid.,* 925; *S. v. Burton, ibid.,* 942; *S. v. Martin,* 173 N. C., 810; *Muse v. Motor Co.,* 175 N. C., 471; *Mfg. Co. v. Bldg. Co.,* 177 N. C., 106; *Bradley v. Mfg. Co., ibid.,* 155; *Futch v. R. R.,* 178 N. C., 284; *Hale v. Rocky Mount Mills,* 186 N. C., 51; and there are many others to the same effect and not one to the contrary.

These are all uniform and unequivocal, and there is no reason why a special exemption from so absolutely settled a rule should be made in favor of this defendant. It is true that he is a colored man, indicted and found guilty of the murder of a white man, but there is not the slightest indication in the record or otherwise that he has not had a full, a fair and an impartial trial, and there is no reason why the special privilege of being exempted from so well-settled a principle and, indeed, so necessary a one in the due administration of the law, should be granted him. There is no indication that he has been prejudiced thereby. The presumption of law is in favor of the correctness of the ruling and the impartiality of the presiding judge and of the jury.

R. H. GILLESPIE ET AL. V. SARAH GILLESPIE ET AL.

(Filed 22 January, 1924.)

1. Deeds and Conveyances—Delivery—Intent.

Whether a deed has been delivered does not depend exclusively upon the question of its physical delivery. Both the delivery and the intent to deliver are necessary.

2. Parol Trust—Quantum of Proof.

In order to engraft a parol trust upon a deed which is absolute in form, the proof must be clear, cogent, and convincing.

APPEAL by defendant from *Bryson, J.*, at August Term, 1923, of MACON.

L. F. Gillespie and Samantha Gillespie intermarried on 21 December, 1871; she died on 14 October, 1897, and on 6 March, 1898, he married Sarah Tallent. The plaintiffs are the children born of the first marriage and the defendants are Sarah (the widow) and her children, born of the second marriage.

On 5 June, 1874, John Gillespie and his wife conveyed certain tracts of land to L. T. Gillespie, and on 17 November, 1879, J. G. Crawford, commissioner appointed to sell lands belonging to the estate of Elisha Gillespie, deceased, conveyed other tracts to L. R. Gillespie. On .... March, 1923, L. T. Gillespie executed a paper purporting to be a deed to Sarah Gillespie, his second wife, and Theodore, their son, conveying tracts therein described.

In their complaint the plaintiffs alleged that L. T. Gillespie did not have sufficient mental capacity to execute this deed, that its execution was procured by fraud and undue influence, and that it was never delivered. They further alleged that the lands described in the deed from Crawford, commissioner, to L. T. Gillespie were a part of the estate of Elisha Gillespie, and that all the purchase-money was paid by Samantha Gillespie, the first wife, out of her sole and separate estate, and that L. T. Gillespie held the title to these tracts as trustee, and that the defendants have no other interest therein.

The defendants put in issue the material allegations and pleaded the ten-year, the seven-year, and the three-year statute of limitations.

In answer to the first issue the jury found that the deed to the defendants had never been delivered, did not answer the issues as to mental capacity and undue influence, and found also, in answer to the fourth issue that the purchase-money for the land described in the deed from Crawford, commissioner, was paid out of the separate estate of

Samantha, the first wife. Upon these findings the court held that the action was not barred by the statute of limitations. The defendants appealed.

T. J. Johnson and Frye & Randolph for plaintiffs.
Ray & Ray and A. W. Horne for defendants.

ADAMS, J. The defendants requested an instruction that the jury should answer the first issue in the affirmative if they believed the evidence of Carl Slagle and Fred Slagle. We think the instruction was properly refused. Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee, but also upon the intent of the parties. Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title. Upon the evidence adduced, the ultimate question of delivery was therefore properly submitted to the jury. *Gaylord v. Gaylord,* 150 N. C., 222; *Fortune v. Hunt,* 149 N. C., 358; *Tarlton v. Griggs,* 131 N. C., 216.

We are of opinion, however, that there is error in the following instruction upon the fourth issue: "As to this issue, the burden is cast upon the plaintiffs as in the preceding issue to satisfy you by the greater weight of the evidence that the land described in the commissioner's deed alluded to was purchased with the separate personal estate of their mother, Samantha."

In *McNair v. Pope,* 100 N. C., 404, it is said that under our former practice an equity could not be set up in opposition to a positive denial unless it had more substantial support than the testimony of a single witness, and that this rule, although it does not now prevail, affords an analogy in the quality of proof necessary to set up a denied equity. Hence it is held that where a deed is absolute in form, conveying upon its face the legal and equitable title, a trust therein must be established by proof which is clear, strong, and convincing. A mere preponderance of the evidence is not sufficient. *Lefkowitz v. Silver,* 182 N. C., 339; *Williams v. Honeycutt,* 176 N. C., 102; *Boone v. Lee,* 175 N. C., 383; *McWhirter v. McWhirter,* 155 N. C., 145; see note, 23 A. L. R., 1511.

We should hesitate to say that there is no evidence to support the answer to the fourth issue; and where there is any evidence whether it is clear, cogent, and convincing, the jury, not the court, must determine. *Cunningham v. Long,* 186 N. C., 526.

As to the first issue, we find no error; upon the fourth, the defendants are entitled to a new trial.

Partial new trial.

THE CITIZENS COMPANY v. ASHEVILLE TYPOGRAPHICAL UNION, No. 263; FRANK J. TORLAY, AND OTHERS.

(Filed 22 January, 1924.)

1. Injunctions—Actions—Associations—Unincorporated Companies.

An unincorporated company or association of workmen is not, as such, subject to be sued or the object of injunctive relief.

2. Same—Employer and Employee—Complaint — Demurrer — Questions for Jury—Trials.

The individual members of a labor organization may ordinarily combine in their efforts, by peaceful persuasion and picketing, to induce others to quit their employment by uniting with them in ceasing to work for employers, whether corporations or individuals; but the employers and employees have relative rights, the one to the services and the other to render services, free from coercion, intimidation, or other unlawful or threatening influences; and where the complaint states a definite cause of action against individual members of an unincorporated labor organization, a demurrer admits the truth of the relevant and pertinent allegations, and thereupon a temporary injunction issued upon due notice to show cause should be continued to the hearing, upon the merits of the cause, for the finding of the facts by the jury.

CLARK, C. J., concurring opinion; HOKE, J., concurring opinion; STACY and ADAMS, JJ., concurring in the opinion of the Court and the concurring opinion of HOKE, J.

RESTRAINING ORDER, heard before *McElroy, J.*, at chambers. From BUNCOMBE, November Term, 1923. Appeal by plaintiff from order vacating restraining order.

Civil action. The facts essential for a decision of this case are as follows:

The plaintiff, a corporation, brought an action against the above-named defendants, Asheville Typographical Union, No. 263, and the other defendants personally. The return on the summons by the sheriff is as follows: "Served 30 October, 1923, by delivering a true and correct copy of the within summons and restraining order to W. J. Beacham, secretary and treasurer of the Asheville Typographical Union, and to each of the defendants named in this action."

The complaint of plaintiff is as follows:

"The plaintiff, complaining of the defendants, and each and every one of them, says:

"1. That The Citizens Company is a corporation, created by and existing under the laws of the State of North Carolina, with its principal office and place of business in the city of Asheville, in the said State, and, at the time hereinafter mentioned, was, and still is, engaged in the

business of printing and publishing a daily newspaper in the city of Asheville, of general circulation in said city and in the State of North Carolina, and known as *The Asheville Citizen* and *The Sunday Citizen.*

"2. That Frank J. Torlay is the organizer of the International Typographical Union, and, shortly before the time of the matters herein complained of, came to the city of Asheville for the purpose of advising his codefendants as to calling and conducting a strike, and, as the plaintiff is informed and believes, has advised, encouraged and procured the commission of the unlawful acts hereinafter alleged.

"3. That Asheville Typographical Union, No. 263, is a labor union, composed of members whose avocation is that of printers.

"4. That W. C. Burt, Harry V. Johnson, Irl T. Bell, James B. Felmet, J. J. Freeman, E. B. Dickinson, J. S. Curry, W. S. Scott, T. A. Luther, Clyde Carscadden, W. J. Beacham, J. B. Battley, J. D. Dillon, P. A. Harris, George W. White, Charles E. Mace, O. H. Deal, W. R. Shook, W. L. Van Wagener, Joseph Hamilton, Z. A. Creighton, G. A. Warlick, Leo R. Palmer, H. L. Beatty, John B. May, L. L. Wolfe, C. C. Rogers, Thomas J. Kennedy, W. S. Meroney, W. A. Sandelson, G. E. McKamey, W. M. Garrett, W. B. Shoor, J. M. Bowers, Monroe Landreth, J. A. Calloway, H. W. Hogoboom, H. N. Townsend, Foy Slagle, R. D. Pethel, George L. Herman, S. J. Lawrence, and A. J. Carey are officers and members of said Asheville Typographical Union, No. 263.

"5. That J. C. Sams is an apprentice, who is working as such, in order to qualify for carrying on the business of a printer.

"6. That the plaintiff, in carrying on its business, hereinafter mentioned, employed and still employs about fifty men and women, and of these a large number are printers and proofreaders.

"7. That the plaintiff has done the defendants no wrong, and the defendants have no grievance of any kind against the plaintiff."

Sections 8, 9, 10, 11, 12, and 13 of the complaint are set forth in the opinion.

"14. The plaintiff has this day commenced a civil action against the defendants in the Superior Court of Buncombe County, N. C., for the purpose of obtaining a perpetual injunction, and a summons has been issued herein.

"15. Wherefore, the plaintiff prays the court that an injunction be issued against the defendants, and each of them, and all other aiders, abettors, and associates, compelling them to cease from indulging in any of the conduct above set forth, to leave the plaintiff free to carry on its business in its own way, without molestation or annoyance of any kind from the defendants."

The following restraining order was issued:

"This cause coming on to be heard before his Honor, P. A. McElroy, Judge of the Superior Court for the Nineteenth Judicial District, on motion of the plaintiff for an order requiring the defendants to show cause, if any cause they have, why the plaintiff is not entitled to the relief demanded in its complaint; and the court being of the opinion that the defendants should be required to show cause, and that in the meantime they should be enjoined, restrained and forbidden from further unlawful interference with the property, business and employees of the plaintiff.

"It is now, on motion, ordered, adjudged and decreed that the defendants, and each of them, show cause before the undersigned judge at his chambers in Asheville, on Saturday, 17 November, 1923, at 10 o'clock a. m., why the injunction herein applied for should not be continued until the final hearing of this action.

"And that in the meantime the defendants, and each of them, and all other persons, are hereby restrained and enjoined from in any way or manner whatsoever interfering with the plaintiff's business or employees, by threats, personal injury, intimidation, suggestion of danger, or threats of violence of any kind, interfering with, hindering, obstructing or stopping any person engaged in the employ of the plaintiff in connection with its business in the city of Asheville or elsewhere, and from interfering, by violence or threats of violence in any manner, with any person desiring to be employed by the plaintiff in or about its place of business, and from inducing or attempting to compel or induce, by threats, intimidation, force or violence, or putting in fear, or suggestions of danger, any of the employees of the plaintiff or persons seeking employment with it, so as to cause them to refuse to perform any of their duties as employees of the plaintiff; and from preventing any person, by threats, intimidation, force or violence, or suggestions of danger or violence, from entering into the employ of said plaintiff; and from protecting, aiding or assisting any person or persons in committing any of said acts; and from assembling, loitering or congregating about or in the proximity of the place of business of the plaintiff for the purpose of doing or aiding or encouraging others in doing any of said unlawful or forbidden acts or things, and from picketing or maintaining at or near the premises of the plaintiff any picket or pickets, and from passing through, over or upon the private alley in the rear of the plaintiff's place of business, and from doing any acts or things whatsoever in furtherance of any conspiracy or combination among themselves, or any of them, to obstruct or interfere with the plaintiff or its business, agents or employees in the free and unrestricted control and operation of its plant and property and in conducting its business, and

from entering upon the grounds and premises of the plaintiff without first obtaining its consent, and from injuring or destroying any of the property of the plaintiff.

"The clerk will issue this order, upon plaintiff giving bond in sum of $5,000 in favor of the defendants and conditioned according to statute."

An order was made, continuing hearing and restraining order from 17 November to 24 November.

The case came on for hearing on 24 November, 1923, and the following judgment was rendered:

"This cause coming on to be heard before his Honor, P. A. McElroy, judge presiding, at this term, upon the complaint, answer and evidence offered by the respective parties in support of their claims and contentions, and at the close of all of the evidence the defendants having demurred *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action, and to move to dismiss said action on that ground; and after argument of counsel, the court stated in open court that he was of the opinion that the restraining order should be continued to the final hearing if the complaint states facts sufficient to constitute a cause of action for injunctive relief, but that he was further of the opinion that the complaint did not state facts sufficient to constitute a cause of action for injunctive relief, and would dissolve the injunction heretofore issued in this cause for that reason, but would allow said injunction to remain in full force and effect until the appeal could be heard in the Supreme Court, provided the transcript would be docketed at this term of said Court, and on further condition that the plaintiff should execute a bond in the sum of $7,500, conditioned as required by chapter 58 of the Public Laws of 1921.

"It is now, on motion, ordered, adjudged and decreed that the restraining order issued herein and dated 30 October, 1923, returnable on 17 November, 1923, be and the same is hereby dissolved.

"Thereupon, plaintiff in open court having prayed an appeal to the Supreme Court from the foregoing order and judgment, and the court finding that an injunction is the principal relief sought by the plaintiff, and upon all of the facts in the case, said injunction should be continued and remain in full force and effect until said appeal has been finally disposed of; and it is ordered by the court that, upon the filing by the plaintiff in the office of the clerk of the Superior Court, entitled as in this cause, a written undertaking with sufficient sureties, in the sum of $7,500, approved by the clerk of the court and conditioned as required by said statute, that said restraining order hereinbefore issued and dissolved shall remain in force and effect pending the said appeal of plaintiff to the Supreme Court of North Carolina and until the hearing and determination thereof.

"It is understood and agreed that this appeal shall be perfected, docketed and heard in the Supreme Court during the week for hearing appeals from the Nineteenth Judicial District, present term, unless the same is continued on motion of the defendants or on motion of the Supreme Court. Should the appeal be not heard by reason of the motion of the plaintiff, then the restraining order hereinbefore dissolved and continued herein shall be dissolved.

"It is further ordered that if the Supreme Court shall hold that the complaint states facts sufficient to entitle the plaintiff to injunctive relief, that said restraining order hereinbefore issued shall be continued until the final hearing.

"It is further ordered that the summons, complaint, judgment, and appeal entries shall constitute the record to the Supreme Court."

To the foregoing judgment plaintiff appealed, and assigned as error:

"1. The court ruled, held and adjudged that the complaint does not state facts sufficient to constitute a cause of action.

"2. The court ruled, held and adjudged that the complaint does not state facts sufficient to constitute a cause of action for the issuance of an injunction.

"3. The court ruled, held and adjudged that the facts alleged in the complaint, and admitted to be true by demurrer, are not sufficient to warrant the issuance of an injunction.

"4. The court ruled, held and adjudged that, upon the facts alleged in the complaint and admitted to be true by demurrer, the injunction should be dissolved.

"5. The court signed the judgment, as appears in the record."

Jones, Williams & Jones and Mark W. Brown for plaintiff.
Gallatin Roberts, George Pennell, and J. W. Haynes for defendants.

CLARKSON, J. The defendants demurred to the complaint *ore tenus* on the ground that it did not set forth a cause of action; that, admitting all the facts alleged in the complaint to be true, as a matter of law, the plaintiff had no cause of action, and the temporary restraining order was properly dissolved by the court below. There is no allegation in the complaint that the Asheville Typographical Union is a corporation, and it is not a natural person. It is an unincorporated association and cannot be sued.

In *Tucker v. Eatough,* individually and as agent for the United States Textile Workers of America, an unincorporated association, 186 N. C., 509, *Clark, C. J.,* said: "If, contrary to common law, an action could be brought without authority of a statute against an unincorporated body, it would be permissible for any person to bring an action

against the Confederate Veterans Association, or the American Legion, or the League of Women Voters, or any other unorganized body, upon an allegation that one of their members had committed the libel or other legal wrong against the person bringing the action. It certainly cannot be necessary to discuss further the proposition that, the United Textile Workers of America not being a legal entity, and there being no statute authorizing them to be sued, that the action was properly dismissed as to them."

This principle is well settled in this State. *Nelson v. Relief Department,* 147 N. C., 104; *Kerr v. Hicks,* 154 N. C., 268. The Yale Law Journal of February, 1924, has an interesting article (by Wesley A. Sturges) citing numerous authorities. It says: "The cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name." (Added, since opinion was written, by consent of the Court.) We think the court below was correct in dissolving the restraining order against the Asheville Typographical Union, No. 263, but not so against the individuals sued.

In the case of *Tucker v. Eatough, supra, Clark, C. J.,* further said: "The defendant, Eatough, is liable for any libel that he may be proven to have issued, and any individuals or corporations who aided and abetted him in issuing a libel can be made parties defendant, but not an unincorporated body of men."

In the instant case the plaintiff has brought suit against forty-five individuals. They have been served with summons, and the plaintiff in the complaint alleges (and for the purpose of this suit it is admitted by the defendants) that it is engaged in the business of printing and publishing a daily newspaper in the city of Asheville, of general circulation in said city and in the State, and known as *The Asheville Citizen* and *The Sunday Citizen.* That the defendant Frank J. Torlay is the organizer of the International Typographical Union and came to Asheville for the purpose of advising his codefendants as to calling and conducting a strike.

Sherwood, J., in the case of *Clothing Co. v. Watson,* 168 Mo., 150, says: "If these defendants are not permitted to tell the story of their wrong, or, if you please, their supposed wrongs, by word of mouth or with pen or print, and to endeavor to persuade others to aid them by all peaceable means, in securing redress of such wrongs, what becomes of free speech and what of personal liberty?" Every person has the liberty of working for whom he pleases. The complaint alleges "That on or about 16 October, 1923, and subsequent thereto, the defendants, with malice and absence of lawful excuse,

"(a) Performed and have executed organized picketing, accompanied by threats, intimidation and violence towards persons employed or seeking employment at the place of business of the plaintiff; and

"(b) Have done actual injury to said employees and the plaintiff in an effort to cause said employees to breach their contracts with the plaintiff and to compel the plaintiff to discharge said employees, through intimidation; and,

"(c) Pursuant to said conspiracy, have advised and are executing a systematic course of espionage, annoyance, intimidation, threats, abuse, and insults, which are intended to make, or calculated to make, and are making the lives of said employees miserable, intolerable, and unendurable; and,

"(d) Unless the defendants are compelled to desist from such conduct, said employees will be forced by intimidation to abandon their contracts with the plaintiff and quit working for the plaintiff, and the plaintiff will be unable to carry on its business; and,

"(e) In pursuance of said conspiracy, plan and purpose, the defendants gather, and have gathered, in large numbers around and about the place of business of the plaintiff, and when said employees are entering said place of business to perform their work, or are emerging and have emerged therefrom after the day's work, the defendants indulge in threatening gestures, insulting jeers and hisses, using abusive, insulting, vile and profane language when addressing said employees, and in many ways annoy, disturb, humiliate, and put said employees in fear; and

"(f) Defendants also are guilty of acts of violence in throwing bricks and other missiles into, upon, and against the building in which the plaintiff carries on its business; and

"(g) Have made threats of great bodily harm and to kill said employees if they continue in the employment of the plaintiff or remain in the city of Asheville; and,

"(h) While said employees are away from the place of employment, the defendants constantly shadow them, following them on the streets, in the restaurants and stores, and to their homes, to their work, in the day, in the night; always and everywhere they are pursued and persecuted by the defendants, sometimes in such numbers as to cause said employees to fear for their lives; and

"(i) Frequently surround said employees whenever and wherever they can find one or more of them, and, by words and gestures, humiliate them and put them in fear; and

"(j) Constantly and systematically call said employees insulting names, such as 'rats,' 'scabs,' 'runts,' 'bowery bums,' and other epithets calculated to humiliate and distress, and which do humiliate and distress said employees and have a tendency to bring on breaches of the peace; and,

"(k) But for the forbearance of said employees, bloodshed and probable loss of life would have occurred; and

"(l) Use of approbrious epithets and insulting language in addressing those of said employees who are ladies, and, while in the presence of said ladies, have used profane and indecent language, all with like purpose and intent; and

"(m) Defendants are constantly and systematically threatening, and have constantly and systematically threatened, said employees by saying in their presence, 'We will get you yet,' and 'We will mop up with you,' and 'You had better leave Asheville or you will be killed,' and 'If you come out again you will be carried back a corpse'; and

"(n) Planned and conspired to destroy the business of the plaintiff for no other reason than that it declined to accede to the unreasonable and unrightful demands of the defendants; and,

"(o) In further pursuance of said plan, purpose and conspiracy to utterly destroy the business of the plaintiff, solely because of the malice and without any lawful excuse, the said defendants have induced many of the employees of the plaintiff to break their contracts that they have made with the plaintiff to work for the plaintiff, and to quit work for the plaintiff; and

"(p) Defendants are still engaged in the acts herein complained of, and threaten to continue the commission of said acts, to the irreparable damage and injury of the plaintiff; . . . unless the defendants are restrained and enjoined, the plaintiff will be irreparably damaged, . . . if not destroyed; and

"(q) That by reason of the said acts of the defendants the plaintiff has no adequate remedy at law."

As we understand the law to be, any individual or group of individuals have a right to organize and use all peaceful means to see that their rights and liberties, as they conceive or believe them to be, are protected, and their idea and endeavor for betterment and uplift are carried into effect. Justice should be done them in their calling or avocation in life. Freedom of conscience, freedom of speech, free writing, and freedom of action are the fundamentals of our government, subject to well-known exceptions as to abuse of these privileges. This right belongs to all individuals and groups—to all sorts and conditions of men alike. We should have no special class or favored few in our government, either of capital or labor. Any individual or group of individuals have a right to work for whom they please, either individually or collectively, and to contract in any manner they see fit and proper. Ordinarily, any individual or group have a right to quit work when he or they see fit, and, by peaceable means, use their influence and argument with other individuals and groups from filling or taking their

places. The quitting work by individuals or combination must be peaceful, and their conduct in persuasion of others must be peaceful. No individual or group of individuals who have these rights can infringe on the lawful rights of others. No individual or group of individuals, in carrying out their idea of right and justice as they consider them to be, can resort to any illegal means to accomplish their purpose — violence, assault, unlawful conspiracy, trespass, or any other actionable wrong. The success of all endeavor for uplift and betterment is lasting and permanent when founded on law and order in its accomplishment. In the adjustment of differences the ideal principle is the "Golden Rule": "And as ye would that men should do to you, do ye also to them likewise." Organized labor, or labor organizations, are not unlawful; they are no more unlawful than any organization or combination of farmers or manufacturers, or any organization or group of lawyers or doctors.

In the case of *S. v. Van Pelt,* 136 N. C., 664, *Connor, J.,* said: "We would not be misunderstood. Capital, either in the form of money or other property, or in the form of skill, experience, intelligence and strength, may combine for lawful purpose. When in either form, or under whatever guise it seeks or conspires to effectuate its purpose, however lawful, by means of violence to person or property, or by fraud or other criminal means, or when by such means it conspires to prevent any person from conducting his own business in his own way, or from employing such persons as he may prefer, or by preventing any person from being employed at such wages or upon such terms as he may prefer, the courts will be prompt to declare and firm to administer the law to punish the guilty and protect the injured."

Labor is human capital. It is the bone and sinew of all industry. Without it material things would crumble and go to waste. The toiler and breadwinner carries out the ideal "In the sweat of thy face shalt thou eat bread." There should be no strife between capital and labor if it can possibly be avoided or prevented. The world is big enough for all, but if strife should come, and the relation of employer and employee cease, it must be peaceful. They have their respective rights under the law. This is orderly government.

In the instant case, we do not finally pass on the facts. Their probative value is for another tribunal. For the purposes of this action, they are admitted to be true. Do the allegations of the complaint entitle plaintiff to have the restraining order issued continued to the hearing as to the persons named as defendants in the action? After a thorough consideration of the entire matter, we think they do, subject to certain modifications. We have listened to the able arguments of the attorneys for plaintiff and defendants and examined carefully their well-prepared

briefs. We think the allegations in the present case go far beyond the facts alleged in the case of *Van Pelt, supra.* The admitted facts by the demurrer *ore tenus* for a decision of this case are different from the case of *McGinnis v. Typo. Union,* 182 N. C., 770. In the *McGinnis case* nothing unlawful was admitted, and every allegation of actionable wrong denied (which appears from the record of the case in the clerk's office). In that case "All motions to dismiss and the demurrer were overruled; *whereupon a large number of affidavits were filed by both sides* (italics ours); and, after a full consideration of the evidence, his Honor continued the temporary restraining order until the final hearing. From this ruling the defendants excepted and appealed." The opinion *per curiam* was as follows: "Some serious and weighty questions of law are presented by the demurrer and the several motions filed in the cause; but we deem it unnecessary to pass upon them now, as we are convinced from a perusal of the record that the evidence adduced and offered on the hearing was not sufficient to warrant a continuance of the injunction. It will, therefore, be dissolved without prejudice to the rights of the parties."

The complaint in this cause alleges, with certainty and definiteness, much that is unlawful—continuous trespass, conspiracy, assault, etc. (which is admitted by the demurrer). There are sufficient allegations and specific facts stated that are definite and certain enough to continue the restraining order against the individual defendants to the hearing, subject to certain modifications. The defendants have a legal right to have a reasonable number for peaceful picketing, but this cannot be attended by any disorder, intimidation or obstruction, but only by observation, watching and persuasion.

The U. S. Supreme Court, in *American Steel Foundries v. Tri-City Council et al.,* 257 U. S., 204, says: "How far may men go in persuasion and communication and still not violate the rights of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of the other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free."

In *Tise v. Whitaker-Harvey,* 144 N. C., 510, *Hoke, J.,* said: "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the hearing. *Hyatt v. DeHart,* 140 N. C., 270; *Harrington v. Rawls,* 131 N. C., 39; *Whitaker v. Hill,* 96 N. C., 2; *Marshall v. Comrs.,* 89 N. C., 103." *Cab Co. v. Creasman,* 185 N. C., 551; *Parks v. Comrs.,* 186 N. C., 490.

The exceptions of plaintiff have been considered on the demurrer *ore tenus* of defendants to the complaint. The judgment of the court below dissolving the restraining order against the Asheville Typographical Union, No. 263, is affirmed. As against the individuals set out in the complaint, the judgment is reversed and modified in accordance with this opinion.

The restraining order under the judgment of the court below is continued against the individual defendants to the hearing and modified in accordance with this opinion.

Affirmed as to the Asheville Typographical Union, No. 263.

Reversed and modified as to the individuals, Frank J. Torlay and others.

CLARK, C. J., concurs that the action was properly dismissed as to the Asheville Typographical Union because it is an unincorporated association and cannot be sued, *Tucker v. Eatough,* 186 N. C., 509; and as to individuals who are parties defendant, is of opinion that as to those matters which are not based upon violence and which are alleged in the complaint herein in the identical language which was used in *McGinnis v. Typographical Union,* 182 N. C., 770, at pp. 771, 772 and 773, the injunction should be dissolved. These matters were held in that case to be "not sufficient to warrant a continuance of the injunction. It will, therefore, be dissolved without prejudice to any of the parties." The same ruling that was made in that case will apply to the allegations in this that are identical or in substance the same for it would be unjust to the defendants to continue the injunction in this case as to such matters.

The parties in this case have a legal right, by "peaceful picketing" and by persuasion, to induce others not to accept employment with the plaintiffs, and as to those matters, the ruling of Judge McElroy should be upheld.

As to the allegations that go beyond those in the *McGinnis case,* and which allege violence and personal intimidation, the injunction should be continued because it is an interference with the rights of those who

may seek employment. Such right is not interfered with by peaceful picketing or persuasion or like allegations not based upon violence. As to the other matters, only, the injunction should be continued until upon a hearing of the facts it is determined which of the defendants, if any, have committed such illegal acts, and to that extent the judgment of his Honor should be modified so as to continue the injunction in force as to such alleged acts of violence, or whatever may be equivalent thereto, and in all other respects it should be dissolved in accordance with the ruling in the *McGinnis case.*

This also applies to the appeal in *Asheville Times Co. v. Typographical Union et als., post,* 157.

HOKE, J., concurring: I concur in the disposition of the present appeal by which, as to the individual defendants, the restraining order is continued to the hearing. The individual defendants have demurred to the complaint, and thereby admitted the facts pertinent to the inquiry, and from these facts, stated in the complaint with precision and definiteness, it appears that for several weeks prior to the institution of the suit the defendants, as individuals and as members of a typographical union, having combined together for that end, have been engaged in a systematic and deliberate course of unlawful intimidation and violence towards plaintiff and its employees, with the view and purpose of interrupting and destroying the lawful prosecution of the plaintiff's business at Asheville, N. C., and that they will succeed in their unlawful purpose unless restrained, etc. In such case, if the courts may not and do not interfere by appropriate and orderly process for the protection of plaintiff and its employees, in my estimate, the rights of private ownership of property and the peaceful pursuit of one's lawful occupation guaranteed in the constitutions of both State and Nation have become meaningless phrases, and government by law will have utterly failed in its purpose. In *McGinnis v. Typographical Union,* 182 N. C., 770-774, the cause was heard and determined on the evidence and affidavits offered, and the sufficiency of the allegations of the complaint were not passed upon or determined. So considered, the Court was of opinion that upon the entire evidence the question of the unlawfulness of defendants' conduct was too much in doubt to permit of the continuance of a restraining order in the case, but no such perplexity is presented in this record, where defendants have filed no affidavits in denial of plaintiff's complaint but have expressly admitted the unlawfulness of their conduct, the unlawfulness of their purpose, and that there is every probability that they will succeed in such purpose unless prevented by process of the court. In the recent case of *Tucker v. Eatough,* 186 N. C., 505, the Court has held that, under the

law as it at present exists in this State, an unincorporated association, as such, cannot be sued, but as to the other defendants served with process, I am of opinion, as stated, that the restraining order should be continued against them to the hearing as individuals and as members of the Typographical Union, or in any other capacity in which they may act or profess to act in violation of plaintiff's rights of person or property and in breach of the State's peace.

STACY and ADAMS, JJ., concur in the opinion of the Court and in the concurring opinion of ASSOCIATE JUSTICE HOKE.

THE BANK OF UNION v. G. B. HEATH, W. J. HEATH, AND G. C. HEATH, PARTNERS, TRADING AS THE HEATH COTTON COMPANY, AND G. B. HEATH AND W. J. HEATH AS INDIVIDUALS.

(Filed 22 January, 1924.)

1. Wills—Intent—Trusts — Estates — Vested Interests — Executors and Administrators.

A devise or bequest to each of the sons of the testator of his designated proportionate part of the residue of an estate to be held in trust by the executors and payment made to them in certain proportions biennially, giving the trustees discretion in withholding the payments upon certain contingencies, without limitation over upon their happening; but that they should continue to invest the estate and pay the net profits over to the designated sons respectively: *Held*, the testator's intent is construed to vest the interest of the sons in each of them respectively.

2. Same—Debtor and Creditor—Judgments—Execution.

Where, as gathered from the will, the intent of the testator is to vest in each of his designated sons his share in the division of the residue of his estate, his direction to his executors and trustees under the will to withhold the share of each for want of business capacity or judgment, and continue to invest and pay the net profits thereof to the sons named, exclusively for their use, without reservation, is inoperative as to the rights of the creditors of the sons; and such interests are subject to execution under a judgment against them.

3. Trusts—Spendthrift Trusts—Statutes.

C. S., 1742, authorizing a spendthrift trust, is limited to an annual income not to exceed $500 a year net, and has no application to the facts of this case.

CLARKSON, J., not sitting.

CIVIL ACTION heard, on motion by plaintiffs for judgment on the pleadings, before *Long, J.*, at October Term, 1922, of UNION.

The action was instituted in 1920 by plaintiff, the Bank of Union, against the Heath Cotton Company, a partnership composed of G. B., W. J., and G. C. Heath, and against G. B. and W. J. Heath as individuals, to recover the sum of $36,283.52, and some interest, due by note, and G. B. Heath being a nonresident, a warrant of attachment was issued and levied on certain tangible property of said defendant in Union County, and also on the remaining interest of said G. B. Heath in his father's estate undistributed and then in the hands of the executors and trustees under the will, to wit, H. B. Heath, W. H. Twitty, and others.

It appeared further that B. D. Heath, the testator and father of G. B., W. J. Heath, etc., died in the county of Mecklenburg, July, 1919, having made his last will and testament disposing of a large estate, devised and bequeathed chiefly to his surviving widow and sons and daughters, etc., and appointing, as stated, H. B. Heath, W. H. Twitty and others executors and trustees under his said will. That the original will was executed in September, 1904, and there were a number of codicils thereafter executed, the first being on 13 June, 1909. That in January, 1921, the garnishees, executors, etc., made formal answer admitting the qualification of the executors and that they held a large estate under the terms of the will of B. D. Heath, but averred, among other things that on a proper interpretation of said will none of said property in their hands or under their control was subject to an attachment or other process for the debts of the Heath Cotton Company or of G. B. Heath and W. J. Heath, or either of them. C. S., secs. 820, 821, etc.

That at August Term, 1922, of said court plaintiff recovered judgment against the cotton company and G. B. and W. J. Heath for the amount as claimed, $36,283.52, and some interest, and execution thereon having been first issued, plaintiff filed their petition in supplemental proceedings against the executors and widow and children, heirs at law and devisees and legatees under the will, who were all served with process, and in said petition alleged that the said executors under said will had in their control and keeping a large estate of their testator ready for distribution, and that as much as $100,000 each of said amount was due and owing defendants G. B. and W. J. Heath, which of right should be justly available to creditors, and which said executors refused to pay over. C. S., secs. 711, 712, etc.

The executors and trustees under the will, while denying that the estate was fully ready for distribution, admitted that they had a large estate in their hands subject to the provisions of the will of B. D. Heath, and again averred that by a proper construction of said will the portion which plaintiffs sought to subject to their said debt as the property of

G. B. and W. J. Heath did not belong to these parties but was held in the discretion of the executors, etc., for the support of said G. B. and W. J. Heath and their families, and not to be paid to them "If they should at the death of the testator and when they became twenty-one be incompetent, by reason of intemperance, bad habits or other cause, to manage their own affairs."

That the will of B. D. Heath is set out in full in the answer of the garnishees, is referred to and made a part of plaintiff's petition in supplemental proceedings, is recognized as controlling on the rights of the parties to this controversy by both plaintiffs and all of the defendants, and the portions of said will pertinent to the inquiry are the thirteenth, fourteenth and fifteenth items in the body of the will executed in 1904, and the first codicil thereto, in 1909, and are as follows:

"Item 13. After the payment of the legacies hereinbefore provided, I direct that my executors divide all the rest and residue of my estate, which is not specifically devised or bequeathed, into equal shares and pay over and deliver one of the said shares to my wife and one to each of my children (except as hereinafter otherwise provided). And in the event that any child shall die leaving a child or children, then such child or children shall represent the deceased parent and take the share that such parent would take under this will, if living, and if any child die before my death, leaving no children, such share shall be divided among my wife and all my surviving children in equal shares, as herein provided.

"In making the division provided for in this item, my executors are authorized to charge my wife and children with such sums as they may be due me as shown by notes in my possession at my death, or by accounts charged against them on book kept by me for that purpose, and the said sums shall bear interest, three per cent per annum, from the time they were loaned or advanced by me, except as to the sums prior to this will, loaned or advanced to my son B. W. Heath, and as to him, I direct on sums prior to this will that there be no interest charged, owing to the fact that he unfortunately lost all that I loaned or advanced him.

"I further direct that my executors shall hold as trustees the shares of such of my children as are under 21 years of age, and shall invest the same as in their judgment they deem best, and expend the income in the support and maintenance of my said children during their minority, and shall pay over to each one his or her share upon arriving at 21 years of age, subject, however, to the provisions hereinafter set forth.

"Item 14. I do not desire to discriminate against any of my children, but, owing to the habits of my son B. W. Heath, and owing to his

failure up to this time from a financial standpoint, I hereby direct that my executors, after deducting his indebtedness to me from what is given him under this will, shall pay one-fifth of his part to him as soon after my death as practicable, and the remaining four-fifths shall be held by my executors as trustees and invested by them in such manner as they deem best, and one-fourth of this remainder shall be paid by my executors to him at the end of every two years until the whole sum is paid: *Provided, however,* that if, owing to his habits and general conduct and demeanor, my executors do not in their judgment deem it for his best interest to make the payment to him, then they are authorized to withhold the payment of all or of such part of the principal as they deem best until such time as they may deem it best to pay it over to him. I direct, however, that in any event the income arising from his share shall be paid to him annually by my executors.

"Item 15. In addition to the specific directions given above in regard to my son B. W. Heath, I direct that if any of my sons should, at my death or at his arrival at full age, be incompetent by reason of intemperance, bad habits or other cause to manage his own affairs, and if any of my daughters shall, at my death or at the time she becomes 21, be married to a man who is, by reason of intemperance, bad habits or other cause, incompetent to manage his affairs, then I direct that the share of each of such sons and daughters shall be held and invested by my executors as trustees, and the income or profits arising therefrom shall be by the said trustees paid over for the support of such child and his or her family if any family there be, until such time as in the judgment of said trustees it shall be prudent to pay over and deliver to said child the part of my estate intended for him or her, and in the event that it shall not become prudent in the judgment of the said trustees to pay over the part to such child during his or her lifetime, then (upon the death of any such son) I direct that the amount be paid over to the wife and descendants of such son in such proportions as they would be entitled to under the statute of distributions, or if there be no descendants, then one-half to his wife, and the remaining half equally divided between my children, the descendants of any deceased child to represent their parent; and in the event that such son shall not leave either wife or descendants surviving him, then his share is to be divided at his death among my other children in equal shares, the descendants of any deceased child to represent their parents; and likewise, in the case of death of any daughter who shall leave an incompetent husband, then the share of such daughter shall be paid over and delivered to her children or descendants of deceased children, if any she leaves surviving her. And in the event that such daughter shall leave no child or descendant of deceased child, then the share intended

for such daughter shall be divided equally among my other children, the descendants of any deceased child to represent their parent.

"I desire that the question as to whether any son or the husband of any daughter may be competent to manage his own affairs under the provisions of this item shall be left to the sound discretion of said trustees, as likewise the question as to the time and manner of the payment of both the corpus and the income, and in the event of the death of all of said executors before the payment of all the legacies herein provided for, then such person as the last survivor among my executors may appoint under his will shall succeed such survivor as trustee, and shall be invested with all the power conferred upon my executors in this will; and in the event that the last surviving executor shall fail to make such appointment in his will, then such person as may be appointed by the proper authorities as administrator *de bonis non cum testamento annexo* shall succeed as trustee and be vested with the discretion and all the powers conferred on my executors in this will.

"Codicil or amendment to my will:

"Item 2. In my will, in which it provides for my wife and her and my children and their descendants, house and lot which is described is annulled and canceled for the reason since I made my will, for a certain sum, I unconditionally deeded to her two hundred feet front on the Lawyer's Road and that width back 300 feet to a ten-foot alley on which our present residence now stands, which more than compensates her for the annullment of the above-described item. In item 14, in which is described conditions on which B. W. Heath is to be paid his part, I want the same conditions applied and carried out as to my sons Harry M. Heath, Gilbert B. Heath, and W. Joe Heath.

13 June, 1909. (Signed) B. D. HEATH.

Witnesses:
J. L. MCCLINTOCK.
MURL PICKARD.
F. L. CROWELL."

That the executors in their answers further allege or admit that on or not long after their qualification they paid to G. B. and W. J. Heath the one-fifth of their estimated legacy as contemplated in item 14 of said will. That these parties were engaged in business on their own account at the time, but that, owing to losses suffered by them in 1920, they had dissipated all the property under their immediate control and incurred large indebtedness, and had showed themselves utterly incompetent to manage their affairs; and thereupon, at a meeting of the executors held in Charlotte, N. C., on 18 February, 1922, in the honest

exercise of the discretion conferred upon them by the will, they formally passed the following resolutions:

"Resolved, first, that after a careful investigation concerning the ability or competency of Gilbert B. Heath and W. Joe Heath, two of the legatees named in said will, to manage their own affairs, the said executors, as trustees, are of the opinion that neither the said Gilbert B. Heath or W. Joe Heath is competent, in the judgment of the said executors and trustees, to manage his own affairs in such a way as to reasonably conserve his own interest and preserve the property bequeathed for his benefit under said will.

"Resolved, second, that in the exercise of the judgment and discretion conferred upon and vested in said executors, as trustees, under and by the terms of said will, it has been this day determined and ordered by them that the share of said estate bequeathed for the use and benefit of each of said legatees, to wit, Gilbert B. Heath and W. Joe Heath, be held and invested by the executors, as trustees, and the income or profits arising therefrom shall be paid over annually, or oftener, if need be, for the support of the said Gilbert B. Heath and his family, and the support of W. Joe Heath and his family, respectively, during the lifetime of each, or until such time as said executors, acting as trustees, shall deem it prudent and wise to pay over the share of each, or either, in said estate, to him or them, respectively."

And aver further: "That said executors and trustees are now holding and intend to hold the parts of said estate intended for the use of said G. B. Heath and W. J. Heath, and their respective families, pursuant to the terms of the above-quoted resolution, until ordered by the court to do otherwise.

"Said executors and trustees admitted in entire frankness to the court that but for the exhibition on the part of said W. J. Heath and G. B. Heath of their inability to manage their own affairs, and to properly preserve and conserve the interests of said estate intended for their use and benefit of their respective wives and children, as exhibited by the reckless, imprudent, and foolish speculations and dealings heretofore referred to, by which they lost not only one-fifth of the share of the estate intended for the benefit of each, but incurred very large liabilities in addition thereto, these respondents would in all likelihood have continued to pay over to the said G. B. Heath and W. J. Heath the installments intended for their use and benefit, and the use and benefit of their respective families, pursuant to item 14 of the will.

"But after having so discovered the incompetency of the said G. B. Heath and W. J. Heath to properly manage their own affairs on account of the transactions hereinbefore referred to, said executors and trustees, in the honest exercise of the discretion conferred upon them

by the said will, concluded that unless they refused to pay to the said G. B. Heath and W. J. Heath, or either of them, further or other funds bequeathed for their use, and the use and benefit of their families under said will, that the said G. B. Heath and W. J. Heath would, in a very short time, on account of the lack of business judgment and capacity to properly manage their own affairs, have squandered and dissipated all the property bequeathed by the said B. D. Heath for the support and maintenance of the said G. B. Heath and W. J. Heath and their respective families, and the education of their children; and for this cause, and for this cause alone, the respondents determined to withhold further payment to either the said G. B. Heath or W. J. Heath, but, on the contrary, decided to withhold the balance of the shares in said estate, bequeathed for their use and benefit, and the use and benefit of their families, in accordance with, and pursuant to, the terms of the resolutions hereinbefore quoted.

"That if the executors as trustees, under the facts hereinbefore narrated, were not authorized under the terms of the will of the said B. D. Heath to make the necessary payments to the said G. B. Heath and W. J. Heath, but on the contrary held the shares bequeathed under the said will for the use and benefit of said G. B. Heath and W. J. Heath in accordance with, and pursuant to, the terms of the resolutions hereinbefore quoted, then the said executors as trustees stand ready to obey any final order of the court made in the premises."

That G. B. Heath makes no answer, but his wife and their children, having been duly made parties, answer and aver that said G. B. Heath has proved himself entirely incompetent to conduct any business of consequence, or to manage his own affairs, and claim the benefit of the provisions of the will for their support and maintenance; and, further, adopt the answer of the executors and trustees as their own.

W. J. Heath answers and alleges that he is entirely competent to manage his own estate; that he has long been in business for himself and has conducted it successfully in the main, and that his losses pointed out in the answers of his codefendants were occasioned by the pronounced policy of deflation after the close of the World War, and the sudden and unlooked-for slump in prices incident thereto, and that defendant's case in this respect was that of large numbers of capable business men at that time, and who had otherwise shown themselves to be thoroughly competent in business matters, and demands that after applying to the payment of his just debts so much of his estate as required for the purpose, that the remainder be turned over to him according to the provisions of his father's will.

It further appears that on leave properly obtained, the First National Bank of Monroe and the Farmers and Merchants Bank of Monroe were

made coplaintiffs, and set up their claims against the Heath Cotton Company and G. B. and W. J. Heath, and demand judgment that the portion of the estate due these parties be applied to plaintiffs' debts.

On full consideration of the record, the court being of opinion that under the will of B. D. Heath the portions due to the two sons, G. B. and W. J. Heath, are available to their creditors, subject to the requirements of a proper administration of their father's estate, it was adjudged that same be so applied and the remainder be turned over to the said defendants.

It further appears from his Honor's decree that should it be found necessary to have them and to incur the expense of such a course, that R. W. Lemonds, C. S. C., has been agreed upon for receiver, and Frank Armfield, Esq., is to act as referee. From the judgment entered, the executors and trustees and others appealed, assigning errors.

J. C. Sykes for First National Bank, W. B. Love for Farmers and Merchants Bank, Parker & Craig for Bank of Union, plaintiffs.

Cansler & Cansler for defendants, appellants.

H. B. Adams, Hemphill & Hemphill, and W. O. Lemonds for Mrs. Lelia Heath and W. J. Heath, appellees.

HOKE, J. On careful perusal of the will of B. D. Heath, and particularly of the clauses above set forth, and more directly pertinent to the inquiry, it appears, in item 13, that it is the purpose and will of the testator that the bulk of his large estate shall be divided into equal shares and a share each given to his surviving widow and his numerous children, payable in due course of administration, except that the executors, as trustees, shall invest and hold the shares of the minors until they become twenty-one, expending the income meantime for their support and maintenance, and except as otherwise provided in the subsequent clauses of the will.

The first of these qualifying provisions is item 14, wherein B. W. Heath, one of the sons, is given his share in absolute ownership, but owing to "his failure up to this time from a financial standpoint," it is not to be paid to him at once and in *toto,* but "one-fifth shall be paid as soon as practicable and one-fourth of the remainder at the end of every two years until the whole sum is paid: *Provided,* that in any event the income arising from his share shall be paid to him annually." True, in this item of the will there is a proviso that "If, owing to his habits and general conduct and demeanor, the executors do not deem it to the best interest of the legatee to make these payments to him, then they are authorized to withhold the payment of all or such part of the principal as they deem best, and until such time as they deem

it best to pay it over to him, but in any event the income arising from his share shall be paid to him annually," but while this may confer upon the executors some discretion in the matter, it is merely as to the time of payment; there is here no limitation over, no authority is conferred to use or expend it, principal or interest, for any other purpose; and, as stated, it is clear throughout that with the indefinite exception noted, the testator in this item constituted and intended to constitute his son, B. W. Heath, the vested owner of his share of the estate.

Under item 15 of the will, the powers conferred upon the executors under specified conditions are more extended. It is therein provided that if, at the time of the testator's death, or on their coming of age, any of the sons are then incompetent by reason of intemperance, bad habits or other cause, or if the daughters at that time are married to a man who is incompetent, and the executors and trustees so determine, the income or profits of their portion shall be paid over for the support of such child and his family until they consider it prudent to pay them the principal, and they in their judgment are authorized to withhold the principal altogether and pay same to their surviving widows and children, if there be such, etc. Under this item 15, and the conditions referred to, it is not necessary now to determine whether or to what extent the interests of the beneficiary may be made available to creditors, but there is manifestly substantial difference made and intended in the powers herein conferred upon the trustees and those which were given in item 14, and it is clear, we think, that the takers under item 14 will not be affected by the provisions of the subsequent item, number 15. We must approve, therefore, the interpretation suggested in the thoughtful brief of one of the counsel of appellees, that the will of B. D. Heath in these portions of the will affecting the bulk of his estate, created and intended to create three distinct classes of beneficiaries—those taking under item 13, to be paid in due course of administration and on coming of age; those taking under item 14, and those under item 15 of the will. The position is emphasized by the terms of the first codicil, applicable, as follows: "In item 14, in which is described conditions on which B. W. Heath is to be paid his part, I want the same conditions applied and carried out as to my sons, Harry M. Heath, Gilbert B. Heath, and W. Joe Heath." The last two being the interests involved in this litigation.

This last clause is of itself sufficient to bring the shares of the two present defendants, G. B. and W. J. Heath, under the provisions of item 14, and affords a satisfactory indication of the reasons influencing the mind of the testator concerning them. When the principal will was executed, in 1904, B. W. Heath had arrived at years of discretion and had been engaged in business for himself, and his father, in con-

sideration of these facts, and having had opportunity to observe and weigh his capacity and disposition, himself determined upon the limitation he deemed proper in reference to his interest. And at the time of the execution of the codicil, five years later, like conditions were no doubt presented as to the three sons, Harry M., G. B., and W. J. Heath, and for like reason the father and testator himself determined the status of their interest, leaving the shares of the other children to the discretion of his executors, as set forth in item 15.

This in our opinion being the correct construction of the will in question, the authorities as they prevail in this jurisdiction are in full support of his Honor's ruling that the shares and interest of these two beneficiaries, G. B. and W. J. Heath, are available to their creditors, and the judgment as entered must be upheld. *Vaughan v. Wise,* 152 N. C., 31; *McMichael v. Hunt,* 83 N. C., 344; *Pace v. Pace,* 73 N. C., 118; *Mebane v. Mebane,* 39 N. C., 131; *Dick v. Pitchford,* 21 N. C., 480.

In *Dick v. Pitchford,* 21 N. C., 480 (1 Devereux & Battle's Equity), it was held that: "A deed for land and slaves upon trust, to apply annually the rents and profits to the use and benefit of the *cestui que trust,* for his life, 'so that they shall not be sold or disposed of or anticipated by him,' without giving the estate over in case of an attempted sale or anticipation, does not prevent an assignment of his interest by the *cestui que trust;* and the assignee has a right to an account of the rents and profits from the time of the assignment; but in such case, if there be ulterior contingent trusts, he has no right to call upon the trustee for the surrender of the possession of the trust property."

This principle was approved and applied to the case of creditors, claimants, in *Mebane v. Mebane, supra,* wherein it was held:

"A. devised certain property to a trustee, in trust to apply the proceeds to the maintenance of his son, and with a proviso that no part of the property should be subject to the debts of his said son: *Held,* that this proviso was inoperative, and the creditors of the son had a right to have their claims paid out of the property.

"By the use of no terms or art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout or the like, and at the same time defy his creditors and deny them satisfaction thereout.

"The only manner in which creditors can be excluded is to exclude the debtor also from all benefit from, or interest in, the property, by such a limitation, upon the contingency of his bankruptcy or insolvency as will determine his interest and make it go to some other person."

And, delivering the opinion, *Ruffin, C. J.,* said: "Then, there is no doubt that the donee, Anderson, has, upon the principles and precedents mentioned, the absolute right to assign his interest in these gifts, and that his assignee would have the right to take the estates under his own control. That being so, it follows that the interest of the *cestui que trust,* whatever it may be, is liable in this Court for his debts; for it would be a shame upon any system of law if, through the medium of a trust or any kind of contrivance, property, from which a person is absolutely entitled to a comfortable, perhaps an affluent, support, and over which he can exercise the highest right of property, namely, alienation, and which, upon his death, would undoubtedly be assets, should be shielded from the creditors of that person during his life. There is no such reproach upon nor absurdity in our law; for we hold that whatever interest a debtor has in property of any sort may be reached by his creditors, either at law or in equity, according to the nature of the property. Terms of exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be, and is, just as much an incident of property as the *jus disponendi* is; for, indeed, it is one mode of exercising the power of disposition."

In *Pace v. Pace, supra, Rodman, J.,* said: "It is settled that by no form of words can property be given to a man or to another, in trust for him, so that he shall not have the right to dispose of his estate in it unless there be in the instrument of gift a proviso that upon an attempted alienation it shall go over to some third person."

In *McMichael v. Hunt, supra, Chief Justice Smith* refers with approval to *Donnell v. Mateer,* 40 N. C., 7, in terms as follows: "The case decided in this Court, *Donnell v. Mateer,* proceeds upon the same principle. The legacy there in question was in these words: 'I leave $300 in the hands of my executors to pay out to her (his daughter) as they see that she needs, if my estate will afford it.' *Ruffin, C. J.,* says: 'The testator intended perhaps to entrust his executors with a vague sort of discretion as to the time of payment, but not with the discretion of withholding payment altogether. The daughter had the absolute right to demand the whole sum at some time, and therefore it is a vested transmissible legacy.' "

A similar decision was made in the more recent case of *Vaughan v. Wise, supra,* where full citations from our previous decisions on the subject are given. These earlier cases in support of what has been termed the English Doctrine have been modified to some extent by our statute in relation to spendthrift trusts. C. S., 1742. A perusal of the law, however, will disclose that such trusts are only permissible

for a restricted amount, "an annual income not to exceed $500 net," and by correct interpretation to be applied to the support of the beneficiary for his life only, and has no application to the interests involved in this litigation, coming under item 14 of the will. *Fowler v. Webster,* 173 N. C., 442.

In many of the other States their courts uphold and apply what is known as the American Doctrine, and which under most conditions is not so exigent in favor of the claims of creditors, and the Supreme Court of the United States has expressed approval of this view. But, as heretofore stated, under the law as it obtains in this State, the interest of these defendants, created under item 14 of the will, is clearly subject to just claims of their creditors, and the judgment of the court below to that effect is

Affirmed.

CLARKSON, J., not sitting.

BANK v. COTTON COMPANY.

(Filed 22 January, 1924.)

PER CURIAM. This case, by consent, was consolidated and heard with *Bank of Union v. Heath,* and involves the same questions as are presented in that case. For the reasons there given, the judgment in this case is also

Affirmed.

CLARKSON, J., not sitting.

CHARLOTTE CONSOLIDATED CONSTRUCTION COMPANY v. ADA W. BROCKENBROUGH ET ALS.

(Filed 22 January, 1924.)

Constitutional Law—Statutes—Due Process—Valid Rights — Estates — Contingent Interests—Wills—Devises—Debts Due by the Testator.

A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the Federal Constitution, Art. I, sec. 10, prohibiting the enactment by any

State of a law impairing the obligation of a contract; or to the Fourteenth Amendment of the Federal Constitution, sec. 1, as to depriving a citizen of his property without due process of law; or contrary to the provisions of our State Constitution, Art. I, sec. 17, prohibiting that a person be disseized of his freehold, etc., except by the law of the land.

APPEAL by defendants from *Harding, J.*, at October Term, 1923, of MECKLENBURG.

Civil action. The facts material for the decision of the case are as follows:

This was an action brought by the Charlotte Consolidated Construction Company, plaintiff, against Ada W. Brockenbrough and others, to remove cloud from title to land, under the provisions of chapter 70, Public Laws 1923. This act provides that where an executor under a will, for the purpose of securing assets with which to pay off valid indebtedness, in good faith, and under the mistaken belief that the will authorized him to do so, sells real estate of said estate for a fair price and applies the proceeds of such sale to the payment of such indebtedness, and these facts are established in an action to remove cloud from title brought by the purchaser or his grantor, in which action all persons who might claim any interest in said property are properly brought into court as parties defendant, then such sale so made by said executor will be declared valid and binding upon all contingent remaindermen, executory devisees, and all persons who might in any contingency claim an interest in said property.

The late Miles L. Wriston died in 1876, seized and possessed of a large amount of property in Mecklenburg County, leaving a will which was duly probated and recorded in the office of the clerk of the Superior Court for said county. In said will he appointed his widow, Mary E. Wriston, his executrix, instructing her to pay all his just debts, and, to make assets for this purpose, empowering her to sell four tracts of land specified in said will. All the residue of his property he devised and bequeathed to said Mary E. Wriston during her natural life or widowhood, with remainder upon her death or remarriage to such of his children as should be then living, and to the issue of such as might be then dead, share and share alike, for the term of their natural lives, with remainder in fee to their children; but in the event of the death of any of the testator's said children without issue, the share of such child to go to his surviving brothers and sisters, or to the issue of such as might be dead; and in the event of the death of all of testator's children without leaving issue, then said property should go to and be equally divided among the testator's brother, William Wriston, his sister, E. Jane Byerly, and the children of his deceased brother, Samuel T. Wriston.

Said Miles L. Wriston died leaving a large indebtedness. His executrix sold all the personal property of said estate and all the four tracts of real property which she was specifically empowered under the will to sell, and apply the proceeds to the payment of said indebtedness. After exhausting such proceeds there still remained debts owed by said estate amounting to about $10,000. To secure assets to pay these debts, said executrix, in good faith and under the mistaken belief that the will authorized her to do so, sold and conveyed to E. D. Latta, the grantor of the plaintiff in this action, a tract of some 87½ acres for a purchase price of $7,416.25, and applied all the proceeds of said sale to the payment of the debts of the estate. It appears that this was a fair price for said property at that time.

Thereafter Latta conveyed this property to this plaintiff. Latta and the plaintiff together have been in sole, exclusive, continuous and peaceable possession of said land since 1890, without any adverse claim thereto having been advanced by any one claiming under said will. The executrix would have been entitled, in a proper proceeding for the sale of land to make assets, to an order of court authorizing the sale of said property.

Mary E. Wriston, widow of the testator and his executrix, died in 1913, without having remarried. Five children of the said Mary E. Wriston and her deceased husband, Miles L. Wriston, survived her and are still living, to wit: Ada W. Brockenbrough, Bessie W. Durham, Lucie W. Ryder, Minnie W. Smith, and Ella W. Lee. But for the conveyance of this property by said Mary E. Wriston, his executrix, to E. D. Latta, these five daughters of the testator would have been entitled to a life estate in said property. Three of them, Ada W. Brockenbrough, Bessie W. Durham, and Lucie W. Ryder, have children, all of whom are of age and who would have been entitled to a remainder in fee in said property, subject to defeasance upon the contingency named in the will. Two of these grandchildren of the testator, to wit, Camille D. Hunter and Sarah B. Payne, have two children each, all of whom are minors, and who would have been entitled to a remainder in said property, contingent upon the death of their respective parents prior to the death of the present life tenants, and subject to defeasance upon the contingency named in the will. Consequently title to this property would not have vested absolutely until the death of either Ada W. Brockenbrough or Bessie W. Durham or Lucie W. Ryder, leaving a child or grandchildren surviving her. In such event title would have vested absolutely in the grandchildren of the testator. Or, in the remote contingency of the death of all of the testator's five daughters without any of them leaving issue, title would have vested in the descendants of the testator's brothers and sisters.

Prior to the commencement of this action all of the children and grandchildren of the testator had executed quit-claim deeds releasing to said E. D. Latta, his heirs and assigns, all their right, title, and interest in said property. The only direct descendants of the testator who have not executed such deeds are his four minor great-grandchildren, contingent remaindermen.

This action is brought for the purpose of having the conveyance by said Mary E. Wriston, executrix, to E. D. Latta, aforesaid, declared valid and binding upon these contingent remaindermen and upon the other contingent remaindermen, descendants of the deceased brother and sister of the testator.

George H. Brockenbrough testified:

"I am one of the defendants in this action. Mrs. Mary E. Wriston, who was the executrix of the last will and testament of her husband, the late Miles L. Wriston, was my mother-in-law. I assisted her in the management and closing up of the estate. Mr. Wriston's estate was subject to rather heavy indebtedness at his death. Mrs. Wriston, the executrix, had to sell all the personal property of the estate, and, following that, all of the real estate which she was empowered by item 1 of the will to sell, in order to secure assets to pay these debts. After she had exhausted these resources there still remained an indebtedness in the neighborhood of $10,000. She then sold to Mr. E. D. Latta the property described in paragraph 1 of the complaint which you show me, which was part of a farm. I made the sale for her. It was sold for a purchase price of about $85 per acre. I don't remember the total amount, but the consideration stated in the deed was the correct amount of the purchase price. At the time that sale was made Mrs. Wriston, as executrix, and I, as her adviser, both understood she had power to make that sale. She made it in good faith and for the sole purpose of acquiring assets with which to pay debts of the estate. All the proceeds of that sale were applied to the payment of the debts of the estate. I was familiar with that property, having lived in Charlotte since 1874. I was more or less familiar with real estate values in and around Charlotte. I tried the market, and the price Mr. Latta paid was the best price I could get for this property. It was considered a fair price at that time. I have been more or less familiar with that property since it was sold to Mr. Latta. I am related by marriage to all the defendants in this action, and I can state that no adverse claim to said property has ever been made by any of the persons who might claim under this will. Since the property was sold to Mr. Latta, so far as I know, Mr. Latta and the plaintiff have been in peaceable possession of this property ever since Mr. Latta bought it. I can state that I was sufficiently familiar with the affairs of this estate to know that all of the

personal property had been sold and that it was necessary to sell this real estate to pay the valid debts then outstanding against the estate. I can swear to that."

E. D. Latta, Jr., testified:

"I am a son of E. D. Latta, who purchased the property involved in this action from Mrs. Wriston. I am vice-president of the Charlotte Consolidated Construction Company, the plaintiff in this action, which bought this property from Mr. Latta. I have been familiar with this property ever since I have been connected with the plaintiff company, which has been 21 years. No claim whatsoever has been made to any title or interest in this property by any one claiming under the last will and testament of Miles L. Wriston during that time."

Plaintiff offered in evidence deed dated 1 September, 1890, recorded in the office of the register of deeds for Mecklenburg County, in Book 74, page 177, as follows:

STATE OF NORTH CAROLINA,
MECKLENBURG COUNTY.

This deed, made this the 1st day of September, 1890, by M. E. Wriston, executrix of M. L. Wriston, deceased, of Mecklenburg County, and State of North Carolina, of the first part, to Edward D. Latta, of Mecklenburg County, and State of North Carolina, of the second part, witnesseth:

That the said M. E. Wriston, executrix of M. L. Wriston, deceased, in consideration of the sum of $7,416.25 to me paid by Edward D. Latta, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell and convey to the said Edward D. Latta and his heirs all that piece or tract of land in Charlotte Township, Mecklenburg County, State of North Carolina, adjoining the lands of W. N. Failing and others, and bounded as follows:

Beginning at a red oak, Wm. Johnston's corner, and runs with his line N. 37¾ W. 55 poles to a pile of stone, W. N. Failing's corner; thence with his line S. 48½ W. 81 poles to a stake and pointers in line of the Smith land (now 4 C's); thence with the line of said land S. 47¼ E. 59 poles to a white oak, corner of Mrs. Orr's land; thence with two lines of the same, first, S. 62 poles to a pile of stone (where a dogwood stood); second, S. 74 E. 27 poles to a pile of stone in the road known as logtown road; thence with said road, first, N. 36¼ E. 26¼ poles; second, N. 1¼ W. 131 poles to a point in the road N. 41¾ E. 26 links from a white oak; thence with Wm. Johnston's line S. 41¾ W. 72 poles to the beginning, containing 87¼ acres, the said land being sold by the acre at $85 per acre.

To have and to hold the aforesaid tract or piece of land, and all privileges and appurtenances thereto belonging, to the said Edward D. Latta

and his heirs and assigns, to them and their only use and behoof forever. And the said M. E. Wriston, executrix as aforesaid, covenants that she is seized of said premises in fee and has a right to convey the same in fee simple, and the same are free and clear from all encumbrances, and that she will warrant and defend the said title to the same against the claims of all persons whatsoever.

In testimony whereof, the said M. E. Wriston, executrix, as aforesaid, has hereunto set her hand and seal, this the day and year above written. M. E. WRISTON, Executrix. (Seal.)

Attest:

GEO. H. BROCKENBROUGH.

STATE OF NORTH CAROLINA,
MECKLENBURG COUNTY.

The foregoing deed was duly proven by oath of the subscribing witness.

Let it with this certificate be registered, this 3d day of September, 1890. J. M. MORROW, C. S. C.

Filed 12 September, 1890; registered 18 September, 1890.

The plaintiff offered in evidence deed dated 5 June, 1914, recorded in the office of the register of deeds of Mecklenburg County, in Book 325, page 549, as follows:

STATE OF NORTH CAROLINA,
MECKLENBURG COUNTY.

This deed, made this the 5th day of June, 1914, by George H. Brockenbrough and wife, Ada W. Brockenbrough, George H. Brockenbrough, Jr., Mary G. and Sarah M. Brockenbrough, J. A. Durham and wife, Bessie W. Durham, Mary W. Durham, Dr. W. Myers Hunter and wife, Camille D. Hunter, B. Rush Lee and wife, Ella W. Lee, Mrs. Minnie W. Smith (widow), Mrs. Lucy W. Ryder (widow), all of the county and State aforesaid, parties of the first part, and Edward D. Latta, of said county and State, party of the second part, witnesseth:

That, whereas, Mrs. M. E. Wriston, executrix of the last will and testament of M. L. Wriston, deceased, for the purpose of making assets with which to pay the indebtedness of her testator, did, on the 1st day of September, 1890, for the consideration of $7,416.25, by deed duly executed, sell and convey to the said Edward D. Latta all that tract of land hereinafter described; and

Whereas the purchase price paid for said land was a full and fair one and was used by said executrix in the payment of the indebtedness of the estate of her testator; and whereas certain doubts have arisen

as to whether the will of the said M. L. Wriston, deceased, conferred upon his executrix plenary power to sell said land for the purpose of making assets with which to pay the indebtedness of said estate without obtaining an order of court to that end; and whereas those of the parties of the first part who are devisees under said will are desirous of ratifying and confirming the act of the said M. E. Wriston, executrix aforesaid, in selling the lands herein referred to and hereinafter described, for the purpose of making assets with which to pay the debts of said estate:

Now, therefore, in consideration of the premises and the sum of one dollar, to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the parties of the first part have hereby granted, remised, released and quit-claimed, and by these presents do grant, remise, release and quit-claim unto the said Edward D. Latta, his heirs and assigns, all their right, title and interest of every nature and description in and to that tract of land, lying and being in the city of Charlotte, county and State aforesaid, and described by metes and bounds in the deed of the said M. E. Wriston, executrix, etc., to the said Edward D. Latta, dated September one, one thousand eight hundred and ninety, and duly recorded in the register's office for said county and State, in Book 174, page 177, reference to which is therein made for a full description to said land. And for the consideration aforesaid, the said parties of the first part do hereby fully ratify and confirm the said deed made by the said M. E. Wriston, executrix, etc., to the said Edward D. Latta, on the said first day of September, one thousand eight hundred and ninety, for the land therein described, to all intents and purposes as if she had been fully authorized and empowered by the will of her testator to execute the same for the purposes therein set forth.

The said deed was duly signed by the grantors therein named, and duly acknowledged, with privy examination of the married women before proper officials, and recorded, in accordance with law.

The plaintiff offered in evidence a deed dated 4 November, 1922, recorded in the office of the register of deeds for Mecklenburg County, in Book 485, p. 54. The said deed is in all respects similar to the before mentioned deed made by Geo. H. Brockenbrough and others. Said deed is made by Virginia L. Ryder, Jno. F. Durham, Bessie Durham Scott and husband, Bryon C. Scott, to Edward D. Latta, and was duly acknowledged with privy examination of the married women before proper officials, and recorded, in accordance with law.

Issues were duly submitted to the jury and the answers thereto set out in the judgment.

The judgment is as follows:

"This cause coming on to be heard before his Honor, Wm. F. Harding, judge holding courts of the Fourteenth Judicial District, and a jury, and it appearing to the court from the returns of summons herein and from the affidavit of E. D. Latta, Jr., that service of summons herein has been duly accepted, or has been had personally upon all the defendants who could after due diligence be found in this State, and that service of summons by publication has been duly made upon all nonresident defendants and upon all persons whose names and residences are unknown who may in any contingency claim any interest in the subject of this action; that proper discreet guardians *ad litem* have been duly appointed by the court for the infant defendants and for all persons whose names and residences are unknown, and for any persons not in being who may in any contingency claim an interest in the subject of this action; that said guardians *ad litem* have duly accepted service of summons and filed answers in behalf of their respective wards to the complaint of the plaintiff, and that the time fixed by law within which the other defendants were required to appear and answer or demur to the complaint of the plaintiff has long since expired, and none of such other defendants having appeared and either answered or demurred to said complaint; and the jury having for their verdict answered all the issues submitted to them by the court in favor of the plaintiff and against the defendants, as follows:

"1. Did the late Mary E. Wriston, executrix of the last will and testament of Miles L. Wriston, deceased, sell the personal property of the estate of her testator and all the real estate specified in item 1 of the will of said Miles L. Wriston, and apply the proceeds thereof to the payment of the debts of said estate as alleged in the complaint? Answer: 'Yes.'

"2. If so, did there remain, after exhausting the proceeds from the sale of such property, an indebtedness in the sum of about $10,000 owing by said estate, as alleged in the complaint? Answer: 'Yes.'

"3. If so, did said Mary E. Wriston, executrix, on or about 12 September, 1890, in good faith, and under the mistaken belief that she was authorized under said will to do so, convey the property described in the complaint of E. D. Latta at and for a purchase price of $7,416.25, in order to secure assets with which to pay said indebtedness, as alleged in the complaint? Answer: 'Yes.'

"4. If so, was said sum of $7,416.25 a fair price for said property, as alleged in the complaint? Answer: 'Yes.'

"5. If so, have said E. D. Latta and his grantee, this plaintiff, and its grantees, been in the sole, exclusive, continuous and peaceable possession of said property for more than 20 years without any adverse

claim to said property having been asserted by any person claiming under the last will and testament of the said Miles L. Wriston, as alleged in the complaint? Answer: 'Yes.'

"6. If so, did said Mary E. Wriston, executrix, apply said sum of $7,416.25 paid by said E. D. Latta as purchase price for said property, and every part thereof, to the payment of the indebtedness of said estate, as alleged in the complaint? Answer: 'Yes.'

"And it appearing to the court from the foregoing verdict of the jury that Mary E. Wriston, executrix of the last will and testament of the late Miles L. Wriston, would have been entitled, in a proper proceeding brought for that purpose, to an order for the sale of the property described in the complaint for the purpose of making assets to pay the debts of her testator:

"Now, therefore, upon motion of plaintiff, it is hereby ordered adjudged, and decreed that the sale and conveyance of the land described in the complaint by said Mary E. Wriston, executrix of the last will and testament of Miles L. Wriston, deceased, to E. D. Latta, the grantor of the plaintiff herein, be and the same is hereby declared valid and binding upon all of the defendants to this action, and upon all other persons, descendants of the late Miles L. Wriston, or of the late Wm. Wriston, or of the late Samuel T. Wriston, or of the late E. Jane Byerly, whatever may be their names and wherever may be their residences, and likewise upon all persons who may be born hereafter, descendants of the late Miles L. Wriston, of the late William Wriston, or of the late Samuel T. Wriston, or of the late T. Jane Byerly."

Defendants C. H. Gover and H. C. Dockery, guardians *ad litem,* in apt time demur *ore tenus* to the complaint of the plaintiff upon the ground that upon the facts set forth in the complaint the plaintiff is not entitled to the relief prayed for and that chapter 70, Public Laws 1923, relied upon by plaintiff in support of its position, is invalid for the reason that it undertakes to validate a transaction which was void in its inception. Demurrer overruled, and defendants except. Case was then heard upon the evidence of the plaintiff, and the jury returned a verdict in favor of the plaintiff and against the defendants. Judgment signed. Defendants except to the judgment of the court, and assign as error:

"1. That his Honor erred in refusing to sustain the defendants' demurrer to the complaint, which is the defendants' first exception.

"2. That his Honor erred in overruling the defendants' objection to the judgment tendered by the plaintiff and in signing the judgment appearing in the record, which is the defendants' second exception."

The exceptions were overruled, and the defendants appealed to the Supreme Court.

Cansler & Cansler for plaintiff.
C. H. Gover and H. C. Dockery for defendants.

PER CURIAM. There is only one question involved in this appeal—the validity of chapter 70, Public Laws 1923. This act is in substance as follows: It provides that where an executor under a will, for the purpose of securing assets with which to pay off valid indebtedness, in good faith, and under the mistaken belief that the will authorized him to do so, sells real estate of said estate for a fair price and applies the proceeds of such sale to the payment of such indebtedness, and these facts are established in an action to remove cloud from title brought by the purchaser or his grantor, in which action all persons who might claim any interest in said property are properly brought into court as parties defendant, then such sale so made by said executor will be declared valid and binding upon all contingent remaindermen, executory devisees, and all persons who might in any contingency claim an interest in said property."

Constitution of U. S., Art. I, sec. 10, in part is as follows: "No State shall . . . pass any bill of attainder, *ex post facto* law, *or law impairing the obligation of contracts.*"

The Fourteenth Amendment to the Constitution of the United States, in part, is as follows: "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of N. C., Art. I, sec. 17, is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of life, liberty, or property but by the law of the land. Const., 1868; Const., 1776; Decl. Rights, s. 12; Magna Carta (1215), ch. 39 (1225), ch. 29."

Black's Constitutional Law (3 ed.), p. 596, says: "Vested rights are to be secured and protected by the law and a statute which divests or destroys such rights, unless it be by due process of law, is unconstitutional and void."

Black, *supra,* at p. 752, says: "Retroactive (or retrospective) laws are not unconstitutional unless they . . . impair the obligation of contracts, or divest vested rights, or unless they are specifically forbidden by the constitution of the particular State."

This matter is clearly stated by the late *Associate Justice Walker,* who was always painstaking and careful, in *Anderson v. Wilkins,* 142 N. C., 157: "The general rule, therefore, is that the Legislature may validate retrospectively any proceeding which might have been author-

ized in advance, even though its act, it has been said, may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise have not incurred. 6 A. & E. Enc. (2 ed.), 940. There are, of course, exceptions to this rule, but this case is not within any of them. In regard to the validity of retroactive legislation, so far as it may affect only expectant or contingent interests, we think the law is well settled that the power thus to deal with such interests resides in the Legislature. *Justice Woodbury* stated the rule with great clearness, and what he said has been accepted by the courts and law-writers as an authoritative utterance and as declaring the true doctrine upon the subject. Laws enacted for the betterment of judicial procedure and the unfettering of estates so as to bring them into the market for sale, cannot be regarded as opposed to fundamental maxims, 'unless (as he says) they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State necessitates amendments or repeal of such laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee.' *Merrill v. Sherburne,* 1 N. H., 213; Cooley (7 ed.), 511. *Chancellor Kent,* in speaking of retroactive statutes, says substantially that, while such statutes affecting and changing vested rights are very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void, yet that this doctrine is not understood to apply to remedial statutes, which may be of a retroactive nature, provided they do not impair contracts, or disturb absolutely vested rights, and only go to confirm rights already existing, and proceed in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights. 1 Kent Com., 445."

The Constitution of North Carolina, annotated by Connor and Cheshire, p. 69, treating of Article I, section 17, under subdivision K, says: "The Legislature has no power to destroy or interfere with vested rights; but a bare expectancy is not such a vested right as will be protected by the constitutional provision." See *Bullock v. Oil Co.,* 165 N. C., 67; *Pendleton v. Williams,* 175 N. C., 252; *Dawson v. Wood,* 177 N. C., 163; *Edwards v. Comrs.,* 183 N. C., 60; *Board of Education v. Comrs.,* 183 N. C., 302; *Burney v. Comrs.,* 184 N. C., 277; *Brown v. Hillsboro,* 185 N. C., 368. The same authors, under subdivision IX, p. 72, says: "The general rule, subject to some exceptions, is that the Legislature may validate retrospectively any proceeding which might

have been authorized in advance, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would not otherwise have incurred."

As a guide it is always well to go back to our fundamental and constitutional law. These at all times should be held sacred. They are the reason and wisdom of ages. No law "impairing the obligation of contracts," "due process of law," "law of the land," "vested rights." The question in the instant case: Is chapter 70, Public Laws 1923, such a retroactive statute as to destroy or interfere with vested rights? We do not think so. Miles L. Wriston died in 1876, leaving a large estate and considerable indebtedness. He willed that all his just debts be paid. He appointed his wife, Mary E. Wriston, executrix, and gave her power to sell four tracts of land specified in the will to pay the debts. After the payment of all the debts he devised and bequeathed all the residue of his property to his wife, Mary E. Wriston, during her natural life or widowhood. On her death or marriage, the remainder over to certain vested, contingent remaindermen and executory devisees. The executrix sold the four tracts of land, which she was given authority to sell under the will, and all the personal property belonging to the estate, and applied the amounts received to the debts of Miles L. Wriston. There was left unpaid debts to the amount of about $10,000. To secure assets to pay these debts, in good faith as executrix, she sold the land in controversy, 87¼ acres, to Edward D. Latta for $7,416.25, which was a fair price for the land at the time, and made a deed to him thinking she had a right to do so. Thereafter Latta conveyed the property in dispute to plaintiff in this case. The deed to Latta was made by Mary E. Wriston, executrix of M. L. Wriston, deceased, on 1 September, 1890, and Latta and his assignee, the plaintiff, have been in the uninterrupted possession of the land ever since the conveyance some 33 years ago. Mary E. Wriston is dead and all of the children and grandchildren of Miles L. Wriston, who are of age, have executed quit-claim deeds releasing to said Edward D. Latta and his heirs and assigns all their right, title and interest in the before mentioned land. The only direct descendants of Miles L. Wriston who have not executed quit-claim deeds are his four minor grandchildren, contingent remaindermen.

The executrix, Mary E. Wriston, would have been entitled, under the law existing at the time she sold the land to Edward D. Latta, to have brought a proceeding for the sale of the 87¼ acres of land to make assets to pay the debts of Miles L. Wriston. The court in such proceedings would necessarily have made all parties who had any interest, vested or contingent, under the will, parties to the action as provided by law.

If this had been done, all parties who had any interest, vested or contingent, would have been bound, and Latta would have gotten a good fee-simple title. The parties who were entitled under the will took subject to debts. Their interest, whether vested or contingent, was *cum onore.* The money that the land brought went to pay the debt which the land was charged with paying. In good conscience, morals and equity, the parties under the will, whether vested or contingent remaindermen or executory devisees, had nothing in the land—no vested interest. The land was subject to the debts of Miles L. Wriston. The sale left the remaining property discharged to the amount of the purchase price paid for the land in controversy free from debt.

The present statute, when all these facts appear, is curative and retrospective, and is *nunc prò tunc,* constitutional, legal, and does not interfere with or destroy vested rights. As was said in *Board of Education v. Comrs., supra:* "Subject to certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding it might have authorized in advance."

In *Edwards v. Comrs., supra,* the Court held a retroactive act of the Legislature validating an invalid attempt of municipal authorities to levy a special road tax after the expiration of the period fixed in the prior act. In this connection the Court said: "This conclusion rests upon the recognized and accepted doctrine that a retrospective law, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act. The General Assembly unquestionably had original authority to confer the right to levy a tax for the year 1921, in like manner as it had done for the two preceding years."

The property was sold to Edward D. Latta in good faith by Mary E. Wriston, executrix, through her son-in-law and adviser, George H. Brockenbrough. He witnessed the deed almost a third of a century ago. From his testimony he has done all he could to keep faith, "the whiteness of his soul," by his conduct, and it may not be amiss to quote from his testimony the conduct of the others: "I am related by marriage to all of the defendants in this action, and I can state that no adverse claim to said property has ever been made by any of the persons who might claim under this will."

From a careful examination of the record we can find no error, and the judgment appealed from was in accordance with law.

No error.

JOHN P. BARBEE v. JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT OF THE NORTH CAROLINA RAILROAD COMPANY, AND THE SOUTHERN RAILWAY COMPANY.

(Filed 22 January, 1924.)

1. **Pleadings—Amendments—Discretion of Court—Commerce — Federal Employers' Liability Act—Railroads.**

In an action against a railroad company for damages for a personal injury brought within the time limited by the State statute, and which has been pending for several years, it is within the sound discretion of the trial judge not to permit the defendant to amend its answer, just before the trial of the cause, and set up as a defense, under the Federal Employers' Liability Act, that the plaintiff, its employee, was, at the time of the injury complained of, engaged in interstate commerce, and his cause of action had been barred in two years under the provisions of the Federal statute.

2. **Same—Waiver.**

Where a railroad company has been sued in the State court for damages for an alleged personal injury, and from the allegations of the complaint it appears that the cause of action was based upon the principles of intrastate commerce, by its answer the defendant waives its right thereafter to set up as a defense that the plaintiff, its employee, at the time of the injury, was engaged in interstate commerce, and contend that the Federal Employers' Liability Act controlled upon the trial.

3. **Same—Answer—Presumptions—Statutes.**

Where an employee's action against a carrier to recover damages for its negligence in inflicting on him a personal injury, upon allegations of the complaint that it arose in intrastate commerce, these allegations will be taken as true when not denied in the answer. C. S., 545.

4. **Constitutional Law — Statutes — Federal Employers' Liability Act — Commerce.**

The Federal Employers' Liability Act is valid and binding upon the State courts under the commerce clause of the Federal Constitution.

5. **Same—Evidence.**

Where a railroad company has failed in apt time to plead defenses under the Federal Employers' Liability Act, and has thereby waived its right, and the trial has been proceeded with upon the allegations of the complaint that the plaintiff, its employee, had been injured while performing his duties in intrastate commerce, evidence that he was so engaged in interstate commerce is irrelevant and properly excluded.

6. **Appeal and Error — Objections and Exceptions — Questions and Answers—Record.**

Exceptions to the exclusion of questions will not be considered on appeal unless the materiality of the expected answers is properly made to appear of record.

7. **Negligence—Evidence—Questions for Jury—Trials.**

In an employee's action against a railroad company to recover damages for a personal injury alleged to have been negligently inflicted on

him in the course of performing his duties, evidence that he was therein injured while running along a way between two parallel tracks on the defendant's yard, by stepping on a piece of stick, unseen by him, while his attention was concentrated upon performing this service, and that it was the duty of the defendant to have kept this pass clean and safe for him, is sufficient to take the case to the jury upon the issue of the defendant's actionable negligence.

8. Statutes—Federal Employers' Liability Act — Commerce — Intrastate Commerce.

The Federal Employers' Liability Act, in relation to interstate commerce, has no application where the defendant railroad company's employee was at the time engaged in his employment as a brakeman in defendant's freight yard, and at the time complained of, his duties were in connection with an intrastate train, though trains engaged in interstate commerce were also made up in these yards.

APPEAL by defendants from *Stack, J.*, at May Term, 1923, of GUILFORD.

The material facts are as follows:

This was a civil action to recover damages for an alleged personal injury received by the plaintiff while working as a yard brakeman on the Pomona yards, near the city of Greensboro, N. C., the plaintiff alleging that the North Carolina Railroad Company was the owner of a railroad track from Charlotte, through Pomona and Greensboro, to Goldsboro, all in North Carolina; that the said railroad company, before the injury complained of and the bringing of this action, had leased its roadbed, yards, and privileges to the Southern Railway Company; that the Southern Railway Company had taken possession of the same, including the yards at Pomona, and had operated the same until 1 January, 1918.

That thereafter all of the railroad yards and switch tracks owned by the North Carolina Railroad Company (all being in North Carolina), and controlled or operated by the Southern Railway Company as lessee, including the locomotives, engines, cars and all other equipment of the Southern Railway Company, were taken over by the United States of America, and since that date, and up to and including the date of the alleged injury to the plaintiff, all of the lines, yards, switch tracks and other equipment of the said North Carolina Railroad Company and the Southern Railway Company were continuously in the possession of, operated and controlled by the Director General of Railroads of the United States, pursuant to certain acts of Congress and proclamations of the President of the United States.

That the Pomona yards is a place where cars are switched, and at the time of the injury to the plaintiff, cars were being assembled by the defendant. That there are twenty-six tracks running parallel and close

to each other, nearly east and west; and that there are brakemen, conductors and engineers who operate the switch engines and cars at Pomona yards for the purpose of assembling the box cars to be used by the defendant. That the plaintiff, at the time of his injury, was employed by the defendant as a brakeman upon said yard, and was in the performance of his duty as such brakeman. That on the morning of 8 April, 1919, the plaintiff was on the Pomona yard, performing his duty as a brakeman; that the engineer on the shifting engine, with whom the plaintiff operated, was running his engine with two cars towards the switch, and it was the duty of the plaintiff to run down the right of way along by the side of the track and by the side of the box cars so that, at the proper place, he might pull the lever of the box cars and uncouple the box cars from the engine, so that they would go onto the switch, as intended by the engineer. That as the engine came back towards the switch the plaintiff ran, as he was required to do, along between the two tracks, for the purpose of performing his duty.

That as he ran down the track towards the switch between the tracks he stepped upon a stick of wood, which the defendant had negligently allowed to remain in the run-way, and which the plaintiff did not see, and that said stick flew up and caught him and threw him upon the ground with great violence and force, whereby his left knee joint was badly damaged, and he was permanently injured.

The defendant admitted that the North Carolina Railroad Company was the owner of a railroad track from Charlotte, through Pomona and Greensboro, to Goldsboro (all in North Carolina); that the Southern leased the same and immediately took possession of the road and the property set forth in the lease of the North Carolina Railroad, and operated it until 1 January, 1918; and that, thereafter, the same was operated and controlled by the Southern Railway Company as lessee; and that the engines, cars and all other equipment of the Southern Railway Company was taken over by the United States of America and was continuously operated and controlled by the United States, through the Director General of the United States, pursuant to acts of Congress and proclamations of the President; that the Pomona yards was a place where cars were switched, and at the time of the injury to the plaintiff there were twenty-six tracks running parallel and close to each other, nearly east and west, and that brakemen, conductors and engineers operated switch engines and cars upon the Pomona yards for the purpose of assembling box cars to be used by the defendant, and that the plaintiff, at the time of his injury, complained of, was employed by the defendant as a brakeman upon said yard, for a valuable consideration, and at the time of his injury was in the performance of his duty as such brakeman, but denied the negligence as set forth in

the complaint, and pleaded contributory negligence of the plaintiff as the proximate cause of his injury.

The defendants, before going into the trial, filed the following motion:

"The defendants, through their counsel, move the court for leave to file an amendment to the original answer, heretofore filed in this action by the defendants, to the end that the said defendants may plead the Federal Employers' Liability Act, and allege additional facts with reference to the plaintiff's injury, to wit, that the plaintiff was, at the time of said injury, employed in, and the defendants were, at the time of said injury, engaged in interstate commerce; that the rights of the said plaintiff and those of the defendants are controlled and determined by the terms of the said Federal Employers' Liability Act; that the plaintiff, at the time of his said injury, was engaged in shifting cars, which cars were destined for points outside of the State of North Carolina, as well as within said State, and which cars were being used in interstate commerce; that the plaintiff's cause of action accrued more than two years prior to the filing of his complaint, and that said action is thereby barred on account of the failure of the said plaintiff to bring his action within the prescribed time. Furthermore, that the defendants be permitted to set up the other facts and matters more particularly recited in the proposed amendment to the original answer, which proposed amendment is hereto attached."

The motion was denied by the court below. To the court's ruling in denying the motion filed, and denying the defendants' right to file the amendment, the defendants excepted.

The following issues were submitted to the jury, and their answers thereto:

"1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$6,200.' "

There are eleven assignments of error, which will be considered in the opinion.

J. A. Barringer and R. C. Strudwick for plaintiff.

Manly, Hendren & Womble and Wilson & Frazier for defendants.

CLARKSON, J. The first assignment of error by defendant is as follows:

"The action of his Honor in overruling the defendant's motion for leave to file an amendment to the original answer filed in the action, to

the end that the said defendants might plead the Federal Employers' Liability Act and allege additional facts with reference to the plaintiff's injury, to wit, that the plaintiff was, at the time of said injury, employed in, and the defendants were, at the time of said injury, engaged in interstate commerce."

This suit was commenced by the issuance of summons on 10 December, 1921, which was served the same day on the defendants. The complaint was filed, and the defendants answered, denying any negligence, and, as a further defense, set up the plea of contributory negligence. The facts as to when, where, and how the plaintiff was injured by the defendants were fully and with definiteness set forth in the complaint. No request, before answer, was made by defendants to have complaint more definite or a bill of particulars asked for.

In *Allen v. R. R.,* 120 N. C., 550, this Court said: "When there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court, in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. The Code, secs. 259 and 261. For this purpose, however, the objector must move in apt time. It is too late after demurrer or answer. *Stokes v. Taylor,* 104 N. C., 394. This motion is addressed to the discretion of the court. *Conley v. R. R.,* 109 N. C., 692; *Smith v. Summerfield,* 108 N. C., 284." *Bristol v. R. R.,* 175 N. C., 510, and cases cited.

The injury occurred to plaintiff on 8 April, 1919. The case was on the docket at issue for some time in the Superior Court of Guilford County. When the case came on for trial, at May Term, 1923, the defendants made a motion to amend their answer, and asked that they be allowed to plead the Federal Employers' Liability Act, and at the time of the injury plaintiff was engaged in interstate commerce, and that plaintiff's cause of action accrued two years prior to the filing of his complaint, and that the action was on that account barred. The court below refused the motion, and the defendants excepted. This matter was in the sound discretion of the court below, under the facts. There was no gross abuse of the discretion. *Fay v. Crowell,* 184 N. C., 417; *Brewer v. Ring,* 177 N. C., 476.

The question further presented in this case is that the allegations in the pleadings are all based on intrastate commerce and there is nothing in the pleadings to show interstate commerce, under the Federal Employers' Liability Act. The pleadings of plaintiff and defendants are based on the regular course and practice of the State courts, and the definite allegations show intrastate commerce. Can the defendants, on trial of the cause, if the evidence shows an interstate question, take

advantage of this and the two-years statute, and defeat plaintiff's recovery without pleading the Federal statute? Should not defendants be bound by their answer, and have they not waived any other defense except that set up in the answer? We think so, and this is the orderly and established rule of practice in this State. *Fleming v. R. R.*, 160 N. C., 196; *Bradberry v. R. R.*, 149 Iowa, 57.

The amendment to the answer which was requested was for the purpose of setting up, under the Federal Employers' Liability Act, that the complaint in the action was not filed within two years after the injury. (It was brought within three years—the State statute.) The summons was issued on 10 December, 1921, and the injury occurred on 8 April, 1919. The court below refused to allow the amendment to the answer, which, in its sound discretion, it had a right to do.

The facts alleged in the complaint were that the plaintiff was injured while working as a yard brakeman on the Pomona yards, near the city of Greensboro, N. C.; the plaintiff alleging that the North Carolina Railroad Company was the owner of a railroad track from Charlotte through Pomona and Greensboro to Goldsboro (all places in North Carolina). It was leased to the Southern Railway Company and taken over by the government.

The allegations of the complaint set forth the injury at Pomona, N. C., and on an intrastate railroad in North Carolina. The defendant admitted that the North Carolina Railroad Company was the owner of a railroad track from Charlotte through Pomona and Greensboro to Goldsboro (all places in North Carolina); that it was leased to the Southern Railway Company and taken over by the government. The defendants denied negligence and pleaded contributory negligence.

In the answer no allegation of interstate commerce or question of facts that brought the case within the Federal Employers' Liability Act was made. Our statute (C. S., 543) is as follows: "Every material allegation of the complaint not controverted by the answer is, . . . for the purposes of the action, taken as true." . . .

If the defendants had set up the Federal Employers' Liability Act and the two-years statute, in accordance with the law and practice of the courts of this State, its provisions would apply.

The Federal Employers' Liability Act, enacted by Congress, has been held constitutional, under the power committed to it by the Commerce Clause of the Constitution, and all States are bound by its provisions. The Constitution of the United States is the "golden cord" that binds the States together.

In the instant case the principle as laid down by *Mr. Justice Clarke*, of the Supreme Court of the United States, in *Atlantic Coast Line Ry. Co. v. Mims*, 242 U. S. (61 Law Ed.), 479, is the view applicable to

the facts in this case. It is said there: "While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a State rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the State Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this Court can review."

Mr. Justice Holmes, in *Nevada-Cal.-Oregon Railway Co. v. Burrus,* 244 U. S., 105, said: "Upon this question, whether a claim of immunity under a statute of the United States has been asserted in the proper manner under the State system of pleading and practice, 'the decision of the State Court is binding upon this Court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.' *Atlantic Coast Line R. R. Co. v. Mims,* 242 U. S., 532, 535. The most that could be said in this case was that the Supreme Court was influenced in its judgment by the fact that the railroad, after treating the plaintiff very badly, was trying to escape liability by an after-thought upon a debatable point of law—not at all by the fact that the law involved was Federal. The plaintiff had tried the case, relying upon the presumption which was sufficient as the pleadings stood. *Cin., New Orl. & Tex. Pac. Ry. Co. v. Rankin,* 241 U. S., 319. The Court reasonably might decline to put him to procuring other evidence from a distance on the last day of the trial, upon a new issue presented after his evidence was in. We perceive no reason why this Court should interfere with the practice of the State."

In *Hartford Life Ins. Co. v. Johnson,* 249 U. S., 492, the Court says: "The jurisdiction of this Court to review the final judgment or decree of the highest Court of a State, in such a case as we have here, is defined in section 237 of the Judicial Code, as amended 6 September, 1916, chapter 448, 39 Stat., 726, which provides that it shall be competent for this Court, by *certiorari,* to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States, and 'the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution.' It is the settled law that this provision means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted, the decision of the State Court is binding upon

this Court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.'" *Atl. C. L. Ry. Co. v. Mims, supra; Gasquet v. Lapeyre,* 242 U. S., 367, 371, and cases cited.

The second, third, fourth, and fifth assignments of error, which are as follows, will be treated together:

"The court below refused to allow the defendants to ask the witnesses named the following questions:

"John P. Barbee. 'You have seen cars in these trains that you broke up and reassembled for the Pennsylvania Railroad, for the Norfolk and Western road, for the Chesapeake and Ohio road, the Erie, and for practically all of the great trunk lines in the country?'

"John P. Barbee. 'I ask you whether or not, in your employment there on the yards of the Southern Railway Company, on this day and on prior days, you had not been engaged in breaking and reassembling cars that belonged to the Pennsylvania Railroad, the Chesapeake and Ohio Railroad Company, and the Erie Railroad Company, and other large trunk lines, and if you didn't see on those cars the names of the railroads mentioned?'

"W. M. Thompson. 'Did you have cars of all kinds, destined to various places throughout the United States, in these freight trains?'

"John P. Barbee. 'Did you, on the morning of this accident, take a freight train to be reassembled that contained cars engaged in interstate commerce and destined to various points throughout the United States?'"

The whole theory of the case was tried on the pleadings that the complaint and answer raised the sole issue of intrastate commerce. Under this aspect of the case the exclusion of the evidence of the court below was correct.

There was no error, for another reason. *Adams, J.,* in *Snyder v. Asheboro,* 182 N. C., 710, says: "Since the record fails to disclose what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness. *In re Smith's Will,* 163 N. C., 466; *Dickerson v. Dail,* 159 N. C., 541; *Boney v. R. R.,* 155 N. C., 95; *Fulwood v. Fulwood,* 161 N. C., 601; *Schas v. Assurance Society,* 170 N. C., 421." *S. v. Jestes,* 185 N. C., 736; *Hosiery Co. v. Express Co.,* 186 N. C., 556.

The sixth assignment of error was as follows: "The action of his Honor in permitting the plaintiff to introduce the record of the old action of John P. Barbee against the North Carolina Railroad Company, No. 6653, as covered by defendant's exception six." The record of the old action, excepted to above, does not appear in the record in

this case, and this assignment cannot be considered. The record, if introduced, was immaterial and not prejudicial, from the view we take of this case.

The seventh assignment of error is the refusal of the court below to sign the judgment tendered by defendant, that the action is barred, under the Federal Employers' Liability Act, as it was not brought within two years of the injury.

The eighth was to the court below overruling defendants' motion of nonsuit.

The ninth was to the court submitting the issues set out in the record.

The tenth was to the court below refusing to set aside the verdict.

The eleventh was to the court signing the judgment.

All these assignments of error will be considered together; they all relate to the issue in this case whether plaintiff, at the time he was injured, was engaged in intrastate or interstate commerce. The facts and the law, as construed by the United States Court, makes the case a very close one, but we are of the opinion that the defendants were engaged in intrastate commerce at the time plaintiff was injured.

We have read the record carefully, and think the following is a fair statement of the facts to present these assignments of error:

"Plaintiff was injured in the Pomona yards of defendants, on 8 April, 1919. These yards are located about two miles southwest of Greensboro station, North Carolina, and are used for storing, assembling and switching freight cars.

"Plaintiff was a yard brakeman. He did not run on any train. He was a member of the yard crew, of which W. M. Thompson was engineer. This crew confined its operations to switching cars in the yard. In this yard was what was designated as a 'lead track.' From this main or 'lead track' there branched out seven other tracks, or switches used for the storage of cars. Upon track, or switch, No. 4, cars for Selma, N. C., were placed or stored; upon track, or switch, No. 6, cars for Spencer, N. C., were placed or stored; upon track No. 3 cars for Monroe, Va., and upon track No. 5 cars for Winston-Salem, N. C.

"Upon the day of the injury the yard crews, including plaintiff, was engaged in placing cars from the lead track upon the various switches branching out therefrom.

"It does not appear when or, as a part of what train, if any, these cars were brought into the Pomona yards. It does not appear whether this train brought them there, if they were ever a part of any train, was a local or a through train.

"About 11 o'clock that day the yard engine was pulling four empty cars along the lead track for the purpose of placing, 'kicking,' or shunting two of them into switch No. 4 (Selma, N. C.), and two of them

into switch No. 6 (Spencer, N. C.). The manner of doing this was as follows: The engineer would get up a speed of ten or twelve miles an hour, and the plaintiff was required to run along the side of the moving cars, and when near the switch into which it was desired certain cars to go, he was required to give a signal to the engineer, and at the proper moment to run in and cut the car loose from the others, when the car, by its own momentum, would roll or be 'kicked' into the switch where it was desired to place it.

"There was a runway near the lead track, along which the yard brakeman was required to run. He had to run at a speed ten or twelve miles per hour. This operation absorbed his entire attention. Defendants employed a man to clear this runway and to keep it clear of obstructions. At the moment of his injury plaintiff had, in the above manner, thrown two of the cars into No. 6 track, or switch (Spencer, N. C.), and had come back and started to throw the other two into No. 4 track, or switch (Selma, N. C.). He gave what is known as the 'kick' signal to the engineer—that is, to increase the speed to ten or twelve miles an hour, when plaintiff, as he was required to do, would cut the cars off and separate them from the engine. Plaintiff, in doing this, while running along the runway on the side of the cars opposite the switch tracks, stepped on a piece of wood lying in the runway, which flew up and caught him between his knees, threw him down, broke his knee-cap, and permanently injured him."

According to the evidence, these cars were being put on intrastate tracks, to be carried to intrastate places. Is this intrastate or interstate commerce? We think the United States Court decisions show intrastate. *Mr. Justice Pitney,* in *Erie Railroad Co. v. Welsh,* 242 U. S., 306, said: "It was in evidence, also, that the orders plaintiff would have received had he not been injured on his way to the yardmaster's office would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Ill. Central R. R. Co. v. Behrens,* 233 U. S., 473, 478."

Mr. Justice Van Devanter, in *Ill. Cent. R. R. Co. v. Behrens, supra,* says: "Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce,

and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

"The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce is whether at the very moment of the accident they are assisting in moving interstate traffic—that is, cars, either loaded or empty, originating in one State and destined to a point in another State, territory, or foreign country." 1 Roberts Fed. Liability of Carriers, 873, citing *S. A. L. Ry. Co. v. Koennecke,* 239 U. S., 352; *Penna. Co. v. Donat,* 239 U. S., 50; *Ill. Cent. Ry. v. Behrens, supra; Clark v. Erie R. Co.,* 230 Fed., 478; *Shanley v. Philadelphia & R. R. Co.,* 221 Fed., 1012.

We think the motion to nonsuit was properly overruled. The facts admitted are: "That as the engine came back towards the switch, the plaintiff ran, as he was required to do, along between the two tracks, for the purpose of performing his duty; that as he ran down the track towards the switch between the tracks, he stepped upon a stick of wood which the defendant had negligently allowed to remain in the runway, and which the plaintiff did not see, and that said stick flew up and caught him and threw him upon the ground with great violence and force, and he was permanently injured."

From the record, the court below, in the charge to the jury, presented the law applicable to the facts. It was a question of fact for the jury to determine. On the entire record we can see no prejudicial or reversible error.

No error.

STATE v. WILL SWITZER.

(Filed 22 January, 1924.)

1. Courts—Indictment—Counts—Criminal Law—Election of Remedies.

Where there are several offenses charged in the bill of indictment, of the same grade of crime and punishable alike, it is, on defendant's motion, within the sound discretion of the trial judge to quash or compel the solicitor to elect.

2. Banks and Banking—Criminal Law—Abstracting Funds—Statutes.

C. S., 4401, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with chapter 4, Laws of 1921, sec. 83, entitled "An act to regulate banking, and repealing all laws in conflict therewith."

3. Same—Depositor—Officers or Agents.

In order to convict a depositor at a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of C. S., 4401; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of the amendatory act of 1921, ch. 4, sec. 83.

4. Same—Indictment—Intent.

In order for conviction for malfeasance of bank officers and agents under the provisions of C. S., 4401, it is sufficient to allege in the indictment the "intent to defraud, without naming therein the particular person or body corporate intended to be defrauded," etc. (C. S., 4621); and an indictment under section 4401, charging the act "with intent to injure," is held sufficient.

5. Same—Principal Offenders.

Where a depositor, in collusion with the cashier of a bank, has "abstracted" or caused to be abstracted by the cashier moneys of the bank in violation of the provisions of C. S., 4401, though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense.

6. Same—Abstracting Funds of Bank—Embezzlement.

The use of the word "abstract" in C. S., 4401, marks a difference between this statute and C. S., 4268, the latter applying to embezzlement; and under the former statute it is not necessary for the indictment or evidence to comply with the terms of C. S., 4268, excepting offenders under the age of sixteen years.

7. Indictment—Criminal Law—Banks and Banking—Abstracting Funds of Bank—Bill of Particulars.

It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of C. S., 4401, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. C. S., 4613.

8. Same—Technicalities.

An indictment for unlawfully abstracting the funds of a bank, to the injury of persons, corporations, etc., is sufficient if it substantially follows the express wording of the statute (C. S., 4401) in a plain, intelligent and sufficient manner, though without strict regard to form, technicality or refinement.

9. Banks and Banking—Statutes—Criminal Law—Abstracting Funds—Evidence—Questions for Jury—Nonsuit—Trials.

The evidence in this case that the defendant had violated the provisions of C. S., 4401, in collusion with its cashier, in unlawfully abstracting the funds of the bank, etc., *is held* to be more than a scintilla, carrying the case to the jury, and a judgment as of nonsuit thereon was properly disallowed.

10. Verdict—Indictment—Several Counts.

A general verdict of guilty on all the related counts in a bill of indictment is a verdict of guilty as to each, and will be sustained if the evidence thereon is sufficient for conviction.

11. Banks and Banking—Criminal Law—Abstracting Funds—Statutes.

The legal meaning of the word "abstract," as it appears in C. S., 4401, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud, etc.

CRIMINAL ACTION, tried before *Devin, J.*, at June Term, 1923, of GUILFORD.

Appeal by defendant. The essential facts are set forth in the opinion.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. J. Gold and Stern & Swift for defendant.

CLARKSON, J. The defendant was convicted of violation of C. S., 4401, which is as follows:

"*Malfeasance of bank officers and agents.* If any president, director, cashier, teller, clerk or agent of any bank or other corporation shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the bank, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the bank, with the intent in either case to injure or defraud or to deceive any officer of the bank, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the State's Prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court."

"An act to regulate banking in the State of North Carolina," etc., section 83, chapter 4, Laws 1921, is as follows:

"*Misapplication, embezzlement of funds, etc.* Whoever, being an officer, employee, agent, or director of a bank, embezzles, abstracts, or wilfully misapplies any of the money, funds, credit, or property of such bank, whether owned by it or held in trust, or wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment or decree, or makes a false statement or certificate as to a trust deposit or contract, for or under which such bank is acting as trustee, or makes a false entry in, or conceals the true

and correct entry in a book, report or statement of such bank, or who shall loan the funds or credit of any bank to any company or corporation known to be insolvent, or which has ceased to exist, or to any person upon the collateral security of any stocks or bonds of such company or corporation which is known to be insolvent or which has ceased to exist or which never had any existence, or fictitiously borrows, solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank, with intent to defraud or injure the bank or another person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, or publishes a false report relating to the financial condition of the bank with the intent to conceal its true financial condition or to defraud or injure it or another person or corporation, shall be guilty of a felony, and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's Prison not more than thirty years, or both."

In the act, *supra,* regulating banking, the repealing clause is: "All laws and parts of laws in conflict with this act are hereby repealed. This act shall be in force from and after its ratification." It was ratified 18 February, 1921.

At the conclusion of the State's evidence the court below allowed the motion of defendant to nonsuit as to the second, third, and fifth counts in the bill of indictment, and refused to allow motion of nonsuit as to the first and fourth counts, which are as follows:

"The jurors for the State, upon their oath, present: That B. H. Hedgecock and Will Switzer, late of the county of Guilford, on or about the.....day of....., 1922, in the year of our Lord one thousand nine hundred and twenty-two, with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously, the said B. H. Hedgecock being then and there an officer, to wit, cashier, of the Home Banking Company of High Point, N. C., a bank, did abstract from said bank the sum of twelve thousand eight hundred and forty-three dollars and seventy-five cents ($12,843.75) by means of the following checks: (giving date, amount, and to whom payable, commencing 5 January, 1921, and ending 20 March, 1922—240 in all), with intent to injure, contrary to the statute in such cases made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid do further present that said Will Switzer, late of Guilford County, at and in the county of Guilford, on or about the ..... day of ....., 1922, with force and arms, unlawfully, wilfully and feloniously, while the said B. H. Hedgecock was then and there acting as an officer, to wit, cashier, of the Home Banking Company, a banking corporation, of High Point, N. C., neither said B. H.

Hedgecock nor Will Switzer being an apprentice and not being under the age of sixteen years, did aid and abet the said B. H. Hedgecock in misapplying the sum of $12,843.75, money of said bank, with intent to knowingly and wilfully misapply the same, contrary to the statute in such cases made and provided, and against the peace and dignity of the State. Bower, Solicitor."

R. R. King, for the State, testified in part as follows: "We told Mr. Switzer what Mr. Hedgecock had said about their putting on forced sales and that then they were to divide the money. Mr. Switzer sat there and did not have much to say. Sometimes he would say, 'What can I do about it?' Then Mr. Penny appealed to Mr. Hedgecock to know if he had not stated to us what I had reiterated to Switzer, and he said he had. Hedgecock said that. And all that Switzer would say was, 'What can I do about it?' Then, some question of Switzer giving some kind of security for his debt came up. It was agreed, after much talking, that Mr. Tomlinson, who was also there in the office, should go down and get the money, such cash as Switzer had in his store that night. It must have been near ten o'clock. There was forty or fifty dollars in the store and Switzer said he wanted eight or ten dollars for his wife, and he was allowed to take that, and the balance of the money was brought back by Tomlinson. Tomlinson was to have the keys and was to open up the store in the morning and remain there; Switzer was to conduct the business and look after it; but all the money at the end of each day was to be turned over to Tomlinson as security for the payment of Switzer's obligation, these overdrafts. Switzer agreed to that arrangement. As a result of Switzer's visit, Mr. Tomlinson took his keys and took possession of the store, and he turned over all of his money except seven or eight dollars which Switzer said he wanted to give to his wife. Switzer's business was taken over by and was in the possession of the Home Banking Company until the creditors threw him into bankruptcy."

George T. Penny, for the State, testified in part as follows: "I asked Hedgecock what had become of this money. He then brought up Switzer's checks amounting to $13,000, and he related about what Mr. King has just related, and I asked Hedgecock what was his idea of allowing Switzer to overdraw his account $13,000, and he said that Switzer had agreed with him that he would go to the Northern markets and purchase and buy goods from different merchants, pay a little to each one, ship the goods into High Point to his store there, advertise a sale, and they would divide up this money. I asked Hedgecock why those checks had not been shown to the directors in their meeting. He said he had put a rubber band around them and put them back in a box in the bank and held them there, as he had promised Mr. Switzer

that he would do, excepting that when Switzer sold his goods that they could settle up the matter, pay it up, and that it could be taken care of. After all of this, and after Mr. King came in, Mr. Hedgecock went all over this again before Mr. King. Mr. King called for some blank warrants, and Mr. Tomlinson went after them to Mr. Brown's office. Mr. Brown was justice of the peace. Mr. King started to draw up a warrant and Mr. Hedgecock says, 'I will draw that on the typewriter if you will dictate it.' He drew the warrant and Mr. Brown came in, the magistrate, and the question arose about how the warrant was to be signed. We read the warrant before Mr. Hedgecock, and I said to Hedgecock, 'Is that a true statement made in that warrant; is that true?' He said 'It is,' and I said 'All right, I will sign the warrant.' So the warrant was drawn up and I signed it. Before they put the warrant in the hands of the officer I said, 'I will go down and have a talk with Switzer and see if this matter can be adjusted.' Switzer was not present at any of the conversations with Hedgecock. I went down to Mr. Switzer's store and I told him I wanted to see him on a matter of business. He and I then went to the bank, where Mr. King, Mr. Hedgecock, and the others were, and we went over the matters with him. Mr. Switzer sat quiet, never said anything, never made any denial of it, but says, 'What can we do about it?' Mr. King went over the matter again and he would sit quiet and say, 'What are we going to do about it?' And I said to Switzer, 'The matter is simply this, according to Mr. Hedgecock's statement you have about $13,000 of the bank's money. The bank examiners are examining the bank and it shows quite a shortage here. What we want you to do is to pay this $13,000. We have got to get ourselves in shape to take care of the deposits, and we want you to make this $13,000 good'; and I said to Mr. Switzer, 'Mr. Hedgecock stated that he agreed to pay these checks for you; you were to take the money, buy goods in your store, advertise a big sale, sell the goods, and then you would divide up and then he would take care of you.' I said, 'Mr. Hedgecock, is that right, is that your statement?' and he says, 'That is exactly it, Will; that is what we agreed on.' I said, 'Is that right, Switzer?' And he said, 'But I haven't had my sale yet; what am I going to do? I haven't had my sale; what am I going to do?' And I said, 'We want you to make this $13,000 good, and we want you to make it good and pay this debt.'"

Penny further testified as to the arrangement by which Switzer turned over the store and the keys to Tomlinson. He also said: "Switzer told me that he paid $50 to Hedgecock to take care of these checks. Switzer told me that he was paying Hedgecock, the cashier, to take care of the overdrafts."

The defendants introduced no evidence. Hedgecock did not deny what the witnesses testified to. Both of the defendants, B. H. Hedgecock and Will Switzer, were convicted and judgment rendered by the court below. Will Switzer alone appealed to this Court, and presents three assignments of error.

The questions involved are set forth succinctly in the defendant's brief. We will consider them, as they cover the assignments of error:

"1. Should the court have quashed the bill of indictment against Switzer?

"2. Should a judgment of nonsuit have been entered at the conclusion of the evidence?

"3. Should the judgment have been arrested after the verdict?

"4. Were sufficient errors committed by the judge in his charge to the jury to grant the appellant Switzer a new trial?"

Should the court have quashed the bill of indictment against Switzer? We think it should as to the fourth count, not as to the first count.

Where there are several offenses, but of the same grade and punishable alike, the power of the court to quash or compel the solicitor to elect is a matter of sound discretion. *S. v. Burnett,* 142 N. C., 580; *S. v. Lewis,* 185 N. C., 643.

Some of the checks were given before the ratification of the Banking Act, as will be seen from the indictment. The Banking Act only repeals "laws and parts of laws in conflict." There is no conflict in the material allegations of the count in the bill of indictment with the statutes. *S. v. Foster,* 185 N. C., 674. The language of the act under which defendant is tried is, "With the intent in either case to injure or defraud."

C. S., 4621, is as follows: "In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any State, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny."

In *Carlisle v. State,* 76 Ala., 77, the Court says: "Intent to injure or defraud is made an ingredient of the offense, of which the defendant was convicted. Without this intent there is no guilt. Intent is rarely shown by direct proof, but is inferred from facts in evidence. Still, to authorize a conviction, the jury must be affirmatively convinced such

intent existed; convinced by that measure of proof required in criminal cases. Our statute employs, disjunctively, the two words, 'Injure or defraud.' Either intent is sufficient to constitute the corrupt motive, if the words are employed in a different sense. Are they so employed? The only injury that can be inflicted, 'by any false pretense or token,' by which one person obtains from another any money or other personal property, is the deception which imposes on the confidence of that other. This is a fraud; and we cannot think the Legislature, in employing the word *injure,* intended to express or, considering the connection, could express, more or less than is implied in the word *defraud.* And this interpretation is fortified by the fact that in prescribing a form of indictment for this offense the same Legislature which declared the ingredients of the crime explained the phrase 'with intent to defraud,' and omitted the word injure."

The first count charges that Hedgecock and Will Switzer jointly "did abstract from said bank . . . by means of the following checks," etc., "with intent to injure." In the first count they are charged as principals.

Upon this the defendant's counsel contends that as the statute applies only to a president, director, cashier, teller, clerk or agent of any bank, and as the defendant Switzer occupied no such relation to the Home Banking Company, he cannot be convicted under this first count; that the offense being a felony, he could not be convicted as principal under the indictment, he not being present at the time the offense was committed, and it is suggested that he could be held to answer only to the bill of indictment which charged him with being accessory before the fact to this felony. We, however, do not understand the law as relied upon by the defendant's counsel to be applicable to this case. Wharton in his Criminal Law, Vol. I (11 ed.), p. 326, enunciates, we think, the proper principle applicable to the facts of this case:

"255. *Persons executing parts of crime separately are principals.* Where one assailant strikes a blow which is not fatal, and a confederate follows it up with a fatal blow, both are principals in the homicide. If part of a crime also be committed in one place and part in another, each person concerned in the commission of either part is liable as principal. Hence, if several combine to forge a document, and each executes, by himself, a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. And if A. counsel B. to make the paper, C. to engrave the paper, D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for forgery and A. as an accessory; for if several make distinct parts of a forged instrument, each

is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others."

See, also, *S. v. Jones,* 83 N. C., 605; *S. v. Dowell,* 106 N. C., 722. Under the facts of this case, then, Switzer was a principal in the commission of the crime, because he necessarily identified himself with Hedgecock, the cashier, in the commission of the crime.

The first count charges Hedgecock, in accordance with the statute, "an officer, to wit, cashier." Under the statute Switzer need not have been an officer, he would be guilty as principal under the facts of this case. The charge under the statute was "abstract," not embezzling. It was not necessary to allege that the defendant is over the age of 16 years. In fact, C. S., 4401, is different from C. S., 4268, which is an embezzlement statute, and excepts the persons named therein under the age of 16 years. We do not think the defendant could complain of the charge of abstracting in a total sum $12,843.75. The amount was made up of 240 separate and distinct transactions. Abstracting money from the bank by means of any one of the 240 checks, contrary to the statute, would be unlawful. In the discretion of the court below, the defendant could be tried separately or all of the checks treated as a whole.

The statute not only makes it unlawful to "abstract" but also to "wilfully misapply," "with the intent in either case to injure or defraud or to deceive any officer of the bank, or if any person shall aid and abet in the doing of any of these things," etc.

We think, under the language of the statute, the first count is drawn according to the practice and procedure of this Court. Form, technicality and refinement have given way to substance, and it is sufficient if the indictment contains the charge in a plain, intelligent, and explicit manner. *S. v. Leeper,* 146 N. C., 655; *S. v. Hedgecock,* 185 N. C., 714; *S. v. Hawley,* 186 N. C., 433.

We think the word "injure" in the first count is in the language of the statute and sufficient. A bill of particulars could have been asked for, if desired. C. S., 4613; *S. v. Leeper, supra.*

Should a judgment of nonsuit have been entered at the conclusion of the evidence? It should have been as to the fourth count. We think not as to the first count. The evidence of King and Perry and the act of Switzer in turning over the keys, store, etc., were more than a scintilla of evidence. Where there is any evidence to support a claim, it is the duty of the judge to submit it to the jury, and the weight of such evidence is for the jury to determine. *Hancock v. Southgate,* 186 N. C., 282. There was a general verdict of guilty, which, in law, was a verdict of guilty on each and every count. The general verdict of guilty upon

two counts will be sustained if the evidence justifies either. *S. v. Toole,* 106 N. C., 736; *S. v. Strange,* 183 N. C., 775.

Should judgment have been arrested after the verdict? We think not except as to the fourth count. For the reasons before mentioned, we think the indictment charges defendant with a crime. Were sufficient errors committed by the judge in his charge to grant the appellant Switzer a new trial? We think not.

A juror asked the court below after the charge to give the legal meaning of the word "abstract." The court answered: "Abstract means to take from, withdraw. That is what is meant by abstracting, withdrawing, taking from. Abstraction, that is taking from with intent to injure or defraud."

We think the court below, under the first count in the indictment and the evidence, was correct in the definition.

Our statute is similar to the U. S. statute. "Abstract, as used in Rev. St. U. S., sec. 5209, is a word of simple popular meaning, without ambiguity. It means to take or withdraw from; so that to abstract the funds of a bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. To constitute that offense, within the meaning of the act, it is necessary that the money and funds should be abstracted from the bank without its knowledge and consent, with intent to injure and defraud it, or some person or persons, or to deceive some officer of the association, or an agent appointed to examine its affairs." *U. S. v. Northway,* 7 Sup. Ct., 580, 584; 120 U. S., 327; 30 L. Ed., 664; 1 Words and Phrases, p. 46.

We have examined the charge of the court below and the assignments of error carefully, and for the reasons given we can see no prejudicial or reversible error.

No error.

FEDERAL LAND BANK OF COLUMBIA, JOE M. BURLISON, AND C. C. GREENWOOD v. GLOBE & RUTGERS FIRE INSURANCE COMPANY.

(Filed 22 January, 1924.)

1. Insurance—Fire Insurance—Policies—Mortgagor and Mortgagee.

The clause in a standard policy of fire insurance, declaring the contract invalid if a change in the title of the lands shall be made by the mortgagor from that stated in the policy, is made by correct interpretation of the terms of a standard form rider attached to the policy, a separate and distinct insurance of the mortgagee's or trustee's interest therein, by the use of the words "that the mortgagee or trustee shall notify this company of any change of ownership which shall come to the knowledge of said mortgagee or trustee," etc.; and where such change in the title

is made by the owner without the knowledge of the mortgagee or trustee, and the acts of the mortgagor that accordingly invalidate the policy as to his rights thereunder do not, at any time after the issuance of the policy, affect the rights of the mortgagee or trustee, under the circumstances.

2. Same—Waiver—Consolidation of Actions—Appeal and Error.

Where a standard policy of fire insurance has been issued by an insurance company on the buildings of the owner upon the lands described in the policy containing a clause that the insurer shall not be liable for a greater proportion of any loss or damage sustained than the sum thereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise, and, unknown to the mortgagee mentioned in the policy, there has been a change by the owner of his interest, and he has obtained other insurance, without the knowledge or consent of the insurer or meeting the requirements of the policy in that respect, the joining by the mortgagee, whose rights are protected under both policies, in the mortgagor's action to recover for the loss by fire, simultaneously with an action against the former one, for the purpose of ascertaining and adjusting its rights under both policies, is not a ratification of the acts of the owner in taking out the second policy, contrary to the provisions of both of them, and which invalidated the policies, and on this appeal the cause is remanded for the consolidation of both actions, for the adjustment of the rights of the parties according to the provisions of the respective policies.

APPEAL by defendant from *Lane, J.*, at June Term, 1923, of BUNCOMBE.

Civil action to recover for loss by fire under a policy of insurance issued by the defendant.

From a verdict and judgment in favor of the Federal Land Bank of Columbia, the defendant appeals, assigning errors.

Mark W. Brown for plaintiffs.

Bourne, Parker & Jones and Ferguson & Vinson for defendant.

STACY, J. Defendant relies chiefly upon its demurrer to the evidence and motion for dismissal or for judgment as of nonsuit, made first at the close of plaintiffs' evidence, and renewed at the close of all the evidence. The exception noted at the close of all the evidence is the only one which may be considered on appeal, the first having been waived by the defendant. *Harper v. Supply Co.*, 184 N. C., 204.

The essential facts, admitted by the parties or sufficiently established on the hearing, are as follows:

1. Joe M. Burlison owned a tract of land in Buncombe County with certain buildings and improvements erected thereon, including a dwelling-house, barn and other buildings. On 23 July, 1918, he executed and delivered to the Federal Land Bank of Columbia a mortgage on

said lands and other property, which he then owned, to secure a loan of $4,800. This mortgage, which was duly registered, contained a covenant that the buildings on the lands should be kept insured against loss or damage by fire for the benefit of the mortgagee.

2. Agreeable with this covenant to keep the buildings insured, Joe M. Burlison, on 11 November, 1918, applied to the Globe & Rutgers Fire Insurance Company of New York (defendant herein, and hereafter called the Globe Company) for a policy insuring the buildings against loss or damage by fire in the amount of $1,000 on the dwelling and $750 on the barn. Attached to this policy was a rider or "standard mortgage clause" in favor of the Federal Land Bank of Columbia, as mortgagee or trustee, as its interest might appear, the material portions of said rider or standard mortgage clause being as follows:

"Loss or damage, if any, under this policy, shall be payable to..... as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only herein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: *Provided,* that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same: *Provided also,* that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"In case of any other insurance upon the within-described property, this company shall not be liable under this policy for a greater portion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

Said policy also carried the following pertinent provisions and stipulations:

A. "This entire policy shall be void, unless otherwise provided by agreement in writing added thereto, (*a*) if the interest of the insured be other than unconditional and sole ownership, or (*b*) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (*c*) if, with the knowledge of the insured, foreclosure pro-

ceedings be commenced, or notice given of sale of any property insured hereunder, by reason of any mortgage or trust deed, or (*d*) if any change other than by the death of an insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), or (*e*) if this policy be assigned before a loss."

B. "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (*a*) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or (*b*) while the hazard is increased by any means within the control or knowledge of the insured."

3. On 1 August, 1919, Joe M. Burlison sold and conveyed all the lands, premises and buildings above mentioned to C. C. Greenwood. No notice of this sale was given to the defendant herein, and the said conveyance was made without its knowledge or consent.

4. On 4 August, 1919, C. C. Greenwood executed a deed of trust, which was duly registered in Buncombe County, conveying the said lands, premises and buildings to Joseph F. Ford, trustee, for the benefit of Joe M. Burlison, to secure the payment of $5,680.20, due by Greenwood to Burlison. No notice of this conveyance was given to the defendant herein, and the same was made without its knowledge or consent. This deed of trust contained a covenant that C. C. Greenwood should keep the buildings on said premises insured against loss or damage by fire for the benefit of the Federal Land Bank of Columbia and the trustee mentioned in said deed of trust.

5. On 14 September, 1920, C. C. Greenwood made and executed a deed of assignment (which was not registered) conveying to L. L. Jenkins all his right, title and interest in and to the lands, premises and buildings aforementioned. No notice of this deed of assignment was given to the defendant herein, and the same was made without its knowledge or consent.

6. The Federal Land Bank of Columbia had no knowledge or information of the several conveyances above mentioned in paragraphs 3, 4, and 5 until after the buildings were destroyed by fire.

7. Agreeable with his covenant to keep the buildings on said premises insured for the benefit of the Federal Land Bank of Columbia, trustee under the mortgage mentioned in paragraph 1, and Joseph F. Ford, trustee under the deed of trust mentioned in paragraph 4 above, C. C. Greenwood, on 8 December, 1920, applied to the Atlas Assurance Company (hereafter called the Atlas Company) for a policy insuring said buildings against loss or damage by fire in the amount of $4,000 on the dwelling, $800 on the barn, and $200 on a smoke-house. No notice

of this application, or of the issuance of the policy of insurance, was given to the Federal Land Bank of Columbia, or to the defendant herein, and the said application was made and policy of insurance obtained without the knowledge or consent of the Federal Land Bank of Columbia, or of the Globe Company. This policy also contained a "standard mortgage clause," identical in general terms with the one above set out.

8. On 10 January, 1921, all the buildings on said premises, including those covered by the policies above mentioned, were totally destroyed by fire.

9. On 31 December, 1921, the Federal Land Bank of Columbia, Joe M. Burlison and C. C. Greenwood, plaintiffs herein, instituted this action against the Globe Company; and, at the same time, the Federal Land Bank of Columbia, the Citizens Bank of Yancey, Joseph F. Ford, trustee, and C. C. Greenwood, with full knowledge of the foregoing facts (except possibly the deed of assignment from Greenwood to Jenkins was not known to all), instituted an action against the Atlas Company to recover upon the policy issued by that company on 8 December, 1920. These two suits were instituted simultaneously at the suggestion of general counsel for the two insurance companies, though not by counsel now appearing for the present defendant, to the end that the rights of all the parties might be brought before the court for adjudication and settlement.

10. The action against the Atlas Company was tried at the June Term, 1923, Buncombe Superior Court, and, by consent, an issue was submitted to the jury to ascertain the value of the property destroyed after the court had intimated that a judgment of nonsuit would be entered. From a judgment of nonsuit in the action against the Atlas Company, the plaintiffs therein have appealed.

11. In the case at bar, tried also at the June Term, 1923, it was agreed that the value of the buildings destroyed, and covered by the policy in suit, should be fixed by the judge in accordance with the finding of the jury in the Atlas case, and that the remaining issues should be answered by the court.

12. At the close of all the evidence, judgment of nonsuit was entered against the plaintiffs, Joe M. Burlison and C. C. Greenwood, and judgment was entered in favor of the Federal Land Bank of Columbia and against the defendant for the full amount of the policy mentioned in paragraph 2 above. From this judgment the Globe Company appeals.

Judgment of nonsuit was entered as to Joe M. Burlison and C. C. Greenwood, upon the ground that they had forfeited all their rights under the policy in suit by executing conveyances and taking out additional insurance in violation of the terms of the contract of insurance issued by the defendant. *Watson v. Ins. Co.*, 159 N. C., 638; *Lancaster*

v. Ins. Co., 153 N. C., 285; *Modlin v. Ins. Co.*, 151 N. C., 35; *Black v. Ins. Co.*, 148 N. C., 169; *Coggins v. Ins. Co.*, 144 N. C., 14; *Sugg v. Ins. Co.*, 98 N. C., 143; *Biggs v. Ins. Co.*, 88 N. C., 141. For a full and clear statement of the cogent reasons supporting this position, see opinion of *Mr. Justice Shiras* in *Assurance Co. v. Building Assn.*, 183 U. S., 308; 46 L. Ed., 213. But neither Joe M. Burlison nor C. C. Greenwood has appealed from this judgment, and no question is presented as to their rights in the instant case.

With respect to the rights of the mortgagee under the standard mortgage clause, it is the generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 141; *Smith v. Union Ins. Co.*, 25 R. I., 260; *Gilman v. Com. Ins. Co.*, 112 Me., 528; L. R. A., 1915 C, 758, and note; *Brecht v. Law Union and Crown Ins. Co.*, 160 Fed., 399; 18 L. R. A. (N. S.), 197, and note; *Germania Fire Ins. Co. v. Bally*, 1 A. L. R. (Ariz.), 488; 14 R. C. L., 1085.

Speaking to this question in *Reed v. Firemen's Ins. Co.*, 80 Atl. (N. J.), 462, *Voorhees, J.*, said: "The standard mortgagee clause creates an independent contract of insurance for the separate benefit of the mortgagee, engrafted upon the main contract of insurance contained in the policy itself, and to be rendered certain and understood by reference to the policy." And to like effect is the language of *Peckham, J.*, in *Eddy v. London Assur. Corp.*, 143 N. Y., 311: "The effect of the mortgagee clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. . . . By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy, which from their nature would properly apply to the case of an insurance of the mortgagee's interest, would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee, must be regarded as ineffective and inapplicable to the case of the mortgagee."

It is the contention of the defendant that while, under the standard mortgage clause, the insurance, as to the interest of the mortgagee or trustee, is not to be invalidated by any act or neglect of the mortgagor or owner of the property, nor by any change in the title or ownership

thereof or increase of hazard, except when done with knowledge of the mortgagee or trustee; yet this stipulation is not to the effect, nor can it be construed to mean that the policy shall not be invalidated by any act or neglect of the mortgagee or trustee. Neither is it to the effect, nor can it be construed to mean, that it will not be invalidated as to the interest of the mortgagee or trustee, should such mortgagee or trustee ratify an act or neglect of the mortgagor, which in itself would be sufficient to invalidate the policy. For this position, defendant relies upon the following authorities: *American Ins. Co. v. Cowan,* 34 S. W. (Texas), 461; *Genesee Assn. v. Fire Ins. Co.,* 44 N. Y. S., 979; *Roper v. Nat. Fire Ins. Co.,* 161 N. C., 151.

The Globe Company set up in its answer, contended on the trial, and insists now that, by the institution of the suit against the Atlas Company and by joining with Greenwood and Ford, trustee, as plaintiffs therein, the Federal Land Bank of Columbia has ratified the acts of Burlison and Greenwood in conveying the property so as to effect a change, other than by the death of the assured, in the interest, title or possession of the subject of insurance; and further, that by joining in said suit the Federal Land Bank of Columbia has ratified the act of Greenwood in applying for and obtaining the additional insurance in the Atlas Company, without an agreement in writing first being attached to the policy in suit, or endorsed thereon, as per stipulation contained therein. *Ferguson v. Plow Co.,* 141 Mo., 161; 42 S. W., 711; *Johnson v. Md. Cas. Co.,* 60 Atl. (N. H.), 1009.

In *Arnold v. Ins. Co.,* 61 S. W. (Tenn.), 1032, plaintiff requested a friend to effect insurance on some household goods, which was done on 11 October, 1899. Plaintiff, without knowing that the property had been insured, and without consulting his friend, had the property insured in another company on 1 November, 19 days thereafter, and the property was destroyed by fire on 27 November, when plaintiff learned for the first time of the policy secured by his friend. In a suit to collect under the policy secured by his friend, it was held that plaintiff was precluded from a recovery by his failure to ascertain whether any insurance had been effected by his agent, under the provision that the policy should be void if the assured should thereafter enter into any other contract of insurance to protect the property covered in whole or in part by the original policy. It was also held that the act of the agent in securing the policy was ratified by plaintiff's bringing a suit thereon, and that he, the assured, was bound by all the provisions of the policy. To like effect is the holding of the Supreme Court of Nebraska in the case of *Hughes v. Ins. Co.,* 59 N. W., 112. There, Hughes obtained a policy of insurance from the Insurance Company of North America, with provision against additional insurance, similar

to the one now before us. Subsequently and without his knowledge or authority, one Hynes procured insurance on the same building in the Phoenix Insurance Company. This policy was issued in the name of Hughes and for his benefit. Hughes knew nothing of this policy until after the fire. Soon after the destruction of the property he made a settlement with the Phoenix Company. In a suit against the Insurance Company of North America it was held that this settlement was a ratification of the act of Hynes in procuring the Phoenix policy, and related back to the date of the issuing of said policy, and hence the plaintiff, Hughes, could not recover, as the act of Hynes, so ratified by Hughes, invalidated the policy issued by the Insurance Company of North America.

In the case at bar, the defendant, the Globe Company, contends that under authority of the Arnold and Hughes cases, just cited, and the reasoning contained therein, the Federal Land Bank of Columbia should be held to have violated the additional insurance clause in the present policy by undertaking to enforce collection under the Atlas policy, and that therefore the instant suit should fail.

In the Arnold and Hughes cases there was apparently no standard mortgage clause attached to the policies in suit, and in each case the stipulation against obtaining additional insurance was held to be binding as against the *owner* or *assured*. But in the case at bar we are dealing with the rights of the mortgagee under what amounts to a separate and distinct contract of insurance. And further, under the facts of the instant case, it could hardly be said that the Federal Land Bank of Columbia intended to violate any of the terms of the present policy by filing two suits simultaneously at the suggestion of general counsel for both insurance companies, to the end that the rights of all the parties might be determined and adjudicated by the court. We think the Federal Land Bank of Columbia is entitled to maintain this suit against the Globe Company under the standard mortgage clause attached to the present policy.

We then come to a consideration of the following stipulation inserted in the standard mortgage clause:

"In case of any other insurance upon the within-described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise."

It will be observed that the language used in this paragraph provides for prorating with any insurance on the property "issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise." As to whether this would extend to

any insurance covering the interest of the owner or mortgagor only, and containing no provision in favor of the mortgagee, we make no present ruling, as it is unnecessary for us to do so. *Eddy v. London Assur. Corp., supra.* But we are of opinion that the present policy should prorate with the one issued by the Atlas Company, each policy containing, as it does, a standard mortgage clause in favor of the Federal Land Bank of Columbia as its interest may appear.

A very satisfactory statement of the reasons why effect should be given to this stipulation will be found in *Hartford Fire Ins. Co. v. Williams,* 73 Fed., 925, though the decision there goes further than it is necessary for us to approve *in toto. Thayer, J.,* in that case, speaking for the Circuit Court of Appeals, Eighth Circuit, said: "The language employed in the mortgage clause, that the insurer 'shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein,' seems to us to have been inserted *ex industria* for the purpose of making it clear that the mortgagee's policy was entitled to prorate with policies covering the insured property that, at the time of the loss, might be held by any person whomsoever who had an insurable interest in the property. We can conceive of no other object that the parties could have had in using the words, 'issued to or held by any party or parties having an insurable interest therein,' unless it was to avoid the very construction of the clause which the Circuit Court appears to have adopted. In the absence of the words last quoted, it might, no doubt, be fairly argued that it was simply the intention of the parties to reserve the right to prorate with other policies procured by the mortgagee for the protection of his interest, but that construction of the clause seems to us to be inadmissible, in view of the language used, which expressly extends the right to prorate to policies 'issued to any party or parties having an insurable interest' in the property. As before remarked, the concluding words of the paragraph seem to have been added, out of abundant caution, that there might be no ground upon which to insist that the right to prorate was limited to policies held by the mortgagee, or for his benefit. It is urged, however, by counsel for the defendants in error that the foregoing view destroys the efficacy of the first paragraph of the mortgage clause, which declares 'that this insurance as to the interest of the mortgagee or trustee . . . shall not be invalid by any act or neglect of the mortgagor or owner of the property insured,' because it puts it in the power of the mortgagor, by taking out additional insurance, to lessen the amount which the mortgagee might otherwise have recovered. It is doubtless true that the construction above intimated lessens the scope that might otherwise be

given to the first paragraph of the mortgage clause, but that it destroys its efficacy as a protection to the mortgagee cannot be admitted. It is obvious that the paragraph in question operates to protect the mortgagee from many acts of the mortgagor which would otherwise render the insurance, as a whole, utterly void, even if it be conceded that, under the construction above given, not only the mortgagor, but third parties, have it in their power to lessen to some extent the amount that may be recovered on the mortgagee's policy. In construing a contract like the one now in hand, it is our duty to look to all of the provisions of the agreement, and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument, which is as clearly expressed as language could well express it, merely because it limits to some extent the scope of general language employed in another part of the instrument. It is very common, in the construction of contracts and statutes, to restrict the meaning of general words and phrases when it is plain to be seen, from particular provisions of the contract or statute, that they were not intended to have the broad signification of which they are fairly susceptible. In the case at bar the first stipulation contained in the mortgage clause, 'that this insurance as to the interest of the mortgagee or trustee . . . shall not be invalidated by any act or neglect of the mortgagor or owner of the property,' is limited and controlled, in our judgment, by the more particular provision with respect to prorating in case of loss, which declares in very specific terms, as we think, that the right to prorate shall extend to and include all policies covering the particular property that are held by any party or parties having an insurable interest therein."

In *Sun Ins. Co. v. Varable,* 103 Ky., 758, a similar conclusion was reached, the Court holding the provision that the interest of the mortgagee should not be invalidated by any act or neglect of the owner or mortgagor of the property insured was limited by the stipulation that the insurer should not be liable for a greater portion of any loss or damage sustained than the sum insured bore to the whole amount of insurance on the property, "issued to or held by any party or parties having an insurable interest therein." Hence, it was held that a policy insuring the mortgagee's interest should prorate with other policies taken out by the mortgagor.

Under the facts of the present case, we think the defendant is entitled to insist upon an observance of the above stipulation in the standard mortgage clause; and hence the cause must be remanded, to the end that this case may be consolidated with the case against the Atlas Company, and the rights of the parties adjusted according to the provisions of the respective policies.

New trial.

MERCHANTS BANK AND TRUST COMPANY OF WINSTON-SALEM, NORTH CAROLINA, v. T. W. WATSON, TRUSTEE, AND THE WACHOVIA BANK AND TRUST COMPANY, ADMR. OF R. E. MATTHEWS, DECEASED.

(Filed 22 January, 1924.)

1. **Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Statutes—Liens.**

The amount of an assessment on the owner of land lying along a street for street improvements is by statute (chapter 56, section 9, Public Laws 1915), creating a lien superior to all other liens and encumbrances and continuing, until paid, against the title of successive owners thereof.

2. **Same—Mortgages—Foreclosures—Title—Contracts.**

In order for a purchaser at a foreclosure sale of land to acquire the title to the mortgagor's equity of redemption, free from liens on the land, it is not alone sufficient that in making his successful bid and in paying the purchase price he intended to so acquire it, but it is necessary that the minds of the parties come to an agreement thereon, as in case of a binding contract.

3. **Same—Purchase Money.**

Where land is sold by foreclosure proceedings under a mortgage, subject to a valid lien in favor of a city, for street improvements, the lien continues upon the land and does not attach to the purchase money paid.

APPEAL by plaintiff from *Shaw, J.*, at February Term, 1923, of FORSYTH.

Civil action. This was an action brought by the plaintiff against the defendants to recover $747.72 and interest.

B. C. Patton owned a piece of land in Winston-Salem, on East Fifth Street and Woodland Avenue. The city of Winston-Salem, by virtue of chapter 56, section 9, Public Laws 1915, known as "An act relating to local improvements in municipalities," which, among other things, provides as follows: "Whenever the governing body shall confirm an assessment for a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour and minute of such confirmation, and from the time of such confirmation the assessment embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances." Under said act, the city of Winston-Salem paved the streets contiguous to Patton's property. The pavement for which the assessment was levied was laid in December, 1919, and was due and payable in ten equal installments, beginning 1 January, 1921; the amount of the assessment on East Fifth Street was $444.15, and that on Woodland Avenue $251.77. At the time of the foreclosure sale, hereinafter mentioned, only one of these annual installments was due and payable. Patton sold the property to John Gregory; he sold the property to

S. W. Kagor, who sold the property to R. E. Matthews. Each purchaser assumed the assessments in his deed, the amount due the city of Winston-Salem for the street improvement. B. C. Patton executed a deed in trust to the defendant T. W. Watson to secure the Winston-Salem Building and Loan Association. When Matthews bought the property, the deed in trust to T. W. Watson, trustee for the building and loan association, was on the property.

R. E. Matthews resided on the property in question, at the corner of East Fifth Street and Woodland Avenue. The plaintiff became interested in the property by reason of the fact that it had loaned Matthews some money, and, finding that he was in failing circumstances, it took a judgment against him on 13 September, 1920, for $2,916.11, with interest on $2,863.13 from 13 September, 1920, and court cost, $7.30, which judgment was duly docketed on said date in Book 26, page 118, office of the clerk of the Superior Court of Forsyth County, and became a lien upon said property from said date. At the time the judgment was taken, the lien of the city of Winston-Salem was on said property for bitulithic assessments amounting to $781.62 and interest, and the deed of trust to T. W. Watson, trustee, for the building and loan association, for $ ..... On 14 October, 1920, the said R. E. Matthews died, and on 1 December, 1920, the Wachovia Bank and Trust Company qualified as his administrator. On 3 December, 1920, the plaintiff filed his proof of debt of judgment lien, as aforesaid, with said administrator. Thereafter, the defendant trustee advertised the property for sale on 19 May, 1921. The plaintiff appeared at the sale and bid on the property $4,035, thinking that was all it was worth, and which would be the approximate sum necessary to pay the bitulithic assessment and the mortgage debt and cost of sale. The plaintiff paid to the trustee, in all good faith, the sum of $4,035. T. W. Watson, the trustee, went to the city tax collector's office and inquired for assessment against R. E. Matthews, and was told there was none. This was an error on the part of the city tax collector, or in the way in which the book of bitulithic assessments is kept, showing only the name of the owner at the time the assessment was levied, which was the name of B. C. Patton. The said defendant trustee kept the money for some days, and finally paid the same into the office of the clerk of the Superior Court—that is, the balance, after paying mortgage debt, cost and taxes, which balance was $747.72. In a few days, however, the said trustee discovered that there was a lien against the property, and went over and informed the clerk to this effect, and tried to get the money back, but the clerk thought that, inasmuch as the amount had been entered on the books, it ought to go to the administrator. The clerk paid the money in his hands to the defendant, the Wachovia Bank and Trust Company, administrator of R. E. Matthews.

The plaintiff prayed judgment directing a return of this money to the trustee and its payment to the city of Winston-Salem, for cost, and for such other and further relief as may be just and proper.

T. W. Watson, trustee, in his answer, admits the advertisement and the sale of the property, as alleged, but denies that there was any agreement that the purchase money paid to him was to be used to discharge the lien of the bitulithic assessment, and he likewise denies any knowledge of any such purpose on the part of the plaintiff. He admits that inquiry was made of the city tax collector with respect to said assessment, but that such inquiry was made after the sale and after the payment of the money. He denies that he told the administrator that the money ought to be applied on the bitulithic assessment and should not be in the hands of the administrator.

The Wachovia Bank and Trust Company, in its answer, says:

1. It admits the allegations with respect to the death of Matthews and its qualification as administrator, and that plaintiff filed his proof of debt with said administrator at the time alleged. It is admitted that the sum of $747.72 was paid to it by the clerk of the court. It is denied that T. W. Watson, trustee, told it that the money ought not to be in its hands as administrator, but should be applied on the bitulithic assessment.

The indebtedness of R. E. Matthews' estate was about $25,000, but a large part has been eliminated by foreclosure proceedings. The amount of unsecured claims will be about $12,000 to $15,000. The administrator has in hand funds of the estate amounting to $1,191.32. The estate is insolvent.

In the county court Thomas W. Maslin, president of the plaintiff bank, testified, in part: "I attended the sale of this property by Mr. Watson, trustee for building and loan, and I bid up to $4,035, and R. E. Matthews bid $4,050, and it was knocked off to him. That night Mr. Watson stated to me that he had accepted my bid instead of Matthews', I being the next highest bidder to Matthews and the highest bidder having fallen out; and subsequently I paid Mr. Watson $4,035. In paying that amount I intended it to be applied according to the way I had figured up, which included building and loan debt, State and county taxes, bitulithic assessment, trustee's commissions, advertising, auctioneer's fees, and all those incidentals that go in to make a sale, in order that the bank could get a clear title. Some time after that, the city tax collector sent us a bill for the bitulithic assessment on this property, which bill has not to this date been paid; and then I began investigating to ascertain what had been done with the money which the bank paid for the purpose of applying it to the payment of the bitulithic assessment as well as other debts, and I found that the trustee

had paid the money into the office of the clerk of the Superior Court, and the clerk had turned it over to the Wachovia Bank and Trust Company, administrator of R. E. Matthews; and I found that the administrator was holding the money for the purpose of paying the debts of the estate, particularly the undertaker's claim, and the administrator was seeking instructions from the court about paying out the money. I tried to get this money applied on the bitulithic assessment, and when I was unable to do so, this suit was instituted. The bank has never been able to get anything on its judgment. The judgment was filed with the administrator."

On cross-examination he testified: "When we paid the money representing the amount of our bid to Mr. Watson, trustee, I did not say anything to him about how we expected it to be used; and while I say I paid it to him with that intention and purpose of having it used in a certain way, I did not disclose to him that intention or purpose. I had been advised of the existence of this lien for bitulithic before the sale of the property by the trustee, and the amount of my bid, $4,035, was sufficient to take care of the building and loan, bitulithic, State and county taxes, commissions, advertising, auctioneer's fees, and clear the title to the property of those liens. The bank loaned R. E. Matthews money to make his first payment on some real estate, for which he executed his note, and that note was reduced to judgment, and the bank filed with the administrator proof of that debt by the judgment. That proof of debt was filed 3 December."

T. W. Watson, trustee, testified, in part: "I was trustee in the deed of trust from Gregory (Patton) to Winston-Salem Building and Loan Association. I put the property up and sold it to Mr. Maslin, and he paid me $4,035. Then I went about to apply the money, and I paid the debt of the building and loan, city and county taxes, and trustee's commissions, also advertising, auctioneer's fees, and all of the incidental expenses. The counsel for Merchants Bank and Trust Company told me that there was a bitulithic assessment against this property, and he reported there was not any against Matthews or Gregory. Then I paid the money into the clerk's office, or possibly I paid the money into the clerk's office before I asked as to the assessment against Matthews. I do not recall now. After I found out this assessment was against the property, being assessed in the name of Patton, I came over and informed the clerk about that."

It was agreed that Thomas Maslin made the purchase at the trustee's sale as trustee for the Merchants Bank and Trust Company, and deed was executed to him in his name; Mr. Maslin, in fact, acting for the bank in the transaction.

The case was first heard in the County Court of Forsyth County, before Judge H. R. Starbuck and a jury, at October 16th Term, 1922.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit, which motion was sustained, and the plaintiff excepted.

The case was heard on appeal before Shaw, J., and the judgment of the Forsyth County Court was affirmed. The plaintiff excepted and appealed to the Supreme Court, and assigned as error:

"For that the court, at the conclusion of plaintiff's testimony, allowed defendants' motion for judgment as of nonsuit."

J. E. Alexander for plaintiff.
Manly, Hendren & Womble for defendants.

CLARKSON, J. On all the evidence, Thomas Maslin, the agent of plaintiff, when he had calculated the entire indebtedness of R. E. Matthews, which was a lien on the property, bid at the sale $4,035, the amount of the indebtedness, and he in good faith thought that he was getting a clear title. If he at the time of the sale had had an understanding and agreement, and it was so announced at the sale by T. W. Watson, trustee, that the highest bidder was to get a clear title, free from encumbrances, and he bid $4,035 with that understanding and agreement with the defendant Watson, then there would be no doubt that Watson, the trustee, would have to pay off the liens, including the street assessment.

Mr. Maslin, president of the plaintiff bank, in his testimony says: "I paid Mr. Watson $4,035. In paying that amount, I intended it to be applied according to the way I had figured up, which included building and loan debt, State and county taxes, bitulithic assessment, trustee's commissions, advertising, auctioneer's fees, and all those incidentals that go in to make a sale." Then again he said: "When we paid the money representing the amount of our bid to Mr. Watson, trustee, I did not say anything to him about how we expected it to be used; and while I say I paid it to him with that intention and purpose of having it used in a certain way, I did not disclose to him that intention or purpose." From the evidence, the minds of Mr. Maslin and Mr. Watson did not meet, and there was no contract. *Overall Co. v. Holmes,* 186 N. C., p. 428.

Under the statute (chapter 56, section 9, Public Laws 1915) the street assessment, "From the time of such confirmation, the assessment embraced in the assignment roll *shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances.*" *Kinston v. R. R.,* 183 N. C., 14.

The statute says that the street assessment "shall be a lien on the real property." T. W. Watson, trustee for the Winston-Salem Building and

Loan Association, sold the land that R. E. Matthews had an equity of redemption in, under the terms of the deed in trust. It was purchased by Mr. Maslin, agent for plaintiff, for $4,035. When sold, no agreement was made to pay out of the purchase money the street assessment, a superior first lien and statutory charge on the land. Under the law, nothing else appearing, the land was sold subject to the street assessment. The trustee, after paying the building and loan debt and other legal expenses and encumbrances, paid the surplus into the office of the clerk of the Superior Court for Forsyth County. (C. S., 2892.)

In *Barrett v. Barnes,* 186 N. C., p. 154, it was said: "'A mortgagee who sells under the mortgage is not liable to a subsequent mortgagee or judgment creditor for the surplus unless he has *actual notice* thereof.' (Italics ours.) *Norman v. Hallsey,* 132 N. C., 6. 'A sale of land under an execution on a junior judgment passes the title to the purchaser encumbered with the lien of prior docketed judgments; but where the sale is made upon execution on the senior judgment the title passes to the purchaser unencumbered; and the lien of any junior docketed judgments is transferred to the fund arising from the sale; and it is the duty of the officer making the sale to apply it to the satisfaction of the several judgments in the order of their priority, whether he has executions in his hands or not.' *Gambrill v. Wilcox,* 111 N. C., 42. *Clark, C. J.,* in *Gammon v. Johnson,* 126 N. C., 64, says: 'In general, all encumbrances, whether prior or subsequent encumbrances, as well as the mortgagor, should be parties to a proceeding for foreclosure, *and judgment creditors as well as mortgagees.*' (Italics ours.) *Jones v. Williams,* 155 N. C., 179, is not in conflict, under the facts in this case."

"Where the sale is made on foreclosure of a junior mortgage or trust deed, the purchaser does not acquire an absolute title, but only the mortgagor's equity of redemption—that is, he takes subject to the elder lien. But, on the other hand, the foreclosure of a senior mortgage will cut off junior liens or encumbrances." 27 Cyc., p. 1491; *Bobbitt v. Stanton,* 120 N. C., 253.

We think that the assumption of the street assessment—statutory lien on the land—by R. E. Matthews, a subsequent purchaser of the land, created an obligation on the part of Matthews to pay it. He agreed to pay it, and it was a valid claim against him. *Baber v. Hanie,* 163 N. C., 588; *Parlier v. Miller,* 186 N. C., p. 501. This principle does not apply in this case. The property in question was sold subject to the street assessment. It was not sold otherwise. The city's lien still attaches to the property and not to the funds derived from a sale under the deed of trust. Hence the purchaser of the property should pay the city's claim, and not the estate of R. E. Matthews, deceased.

True, Matthews agreed with his grantor to assume and to pay off this street assessment. But the specific property upon which the city still has a lien was sold subject to the city's claim. The purchaser, therefore, is liable for the assessment, or rather the property in the hands of the purchaser. The obligation of Matthews to pay the assessment was passed on to the purchaser when the property was sold subject to the lien.

The judgment of nonsuit is

Affirmed.

F. T. HYATT, JEFFERSON HYATT, R. E. HYATT, AND P. E. HYATT v. MRS. JOHN B. HYATT.

(Filed 22 January, 1924.)

1. **Wills—Testamentary Capacity—Evidence—Letters of Testator.**

While the courts allow wide range in allowing in evidence testimony of nonexpert witnesses as to the testator's mental capacity sufficient to make a valid will, upon caveat thereof, it does not extend to letters sought to be introduced in evidence thereof, the contents of which are not supported by the testimony of a witness, but rests alone upon the evidence that they were in the handwriting of the testator.

2. **Wills—Revocation—Later Wills—Evidence—Burden of Proof.**

Where the caveators of a will seek to set aside the will being propounded, on the ground that the testator had made a later will revoking it, the burden is on them to show the making and present existence of the later will, and that it revoked the one theretofore made.

3. **Same—Presumptions.**

Where the caveators to a will have shown the existence of a later will which, they contend, revoked the will being propounded, which was last seen in the possession of the testator and after his death cannot be found, it will be presumed that he had destroyed it with his intention to revoke it.

THIS was a proceeding heard upon a caveat to a paper-writing purporting to be the last will and testament of John B. Hyatt, deceased, heard at September Term, 1922, before *Shaw, J.*, and a jury, of HAYWOOD County. Appeal by plaintiffs, caveators.

J. W. Ferguson and Carter, Shuford & Hartshorn for plaintiffs, caveators.

Morgan & Ward and Alley & Alley for defendant, propounder.

CLARKSON, J. The usual issue was submitted to the jury—*devisavit vel non:* "Is the paper-writing offered by the propounder, or any part

thereof, and if so, what part, the last will and testament of the said John B. Hyatt, deceased?" The jury answered the issue, "Yes, every part of it."

Plaintiffs, caveators, assign the following errors:

"No. 1 is addressed to the refusal of the court to admit in evidence, for the purpose which they were offered, the letters from the alleged testator, John B. Hyatt, to Mrs. W. A. Whitner, and the accompanying envelope, as identified by the witnesses; and the caveators assign said ruling as error, for that, as caveators allege, said ruling is contrary to law.

"2. No. 2 and No. 3 are addressed to those portions of his Honor's charge set out precisely in said exceptions, and which deal with the questions of law arising upon the contention of the caveators that in the event the jury should find that said John B. Hyatt had testamentary capacity and that he had executed the script propounded as his will, that the jury should nevertheless find from the evidence that said will had been revoked, in whole or in part, by a subsequent will. Said exceptions No. 2 and No. 3 are grouped as proper to be considered together; and the caveators assign the portions of the charge so excepted to as error, for that, as caveators allege, the same are contrary to law and the evidence in the case."

The following questions were asked Lucy A. Hyatt (Mrs. John B. Hyatt) on direct examination:

"Q. State to his Honor and the jury whether you know of any other will that your husband ever made than the one in question. Answer: On Sunday before he died on Thursday, he had a severe attack with his heart, and Dr. Roberts was called in and told him he was in a very bad condition, and after the doctor left he called me and told me, 'I am not going to last long, and after I pass away I want you to go to Waynesville and get the will in the safety box there and probate it in Washington and Waynesville, for I have never made any other will to my property.'

"Q. You don't know of any other will? Answer: No, sir."

On cross-examination she said:

"Q. Do you know W. A. Whitner, of this city? Answer: I have seen him on the streets of Waynesville—a policeman.

"Q. There has never been any undue familiarity or improper relation between you and Mr. Whitner? Answer: There certainly has not.

"Q. You never had any compromising correspondence with him? Answer: Never had any correspondence of any kind.

"Q. Your husband never threatened to divorce you on account of relations and correspondence with Whitner? Answer: He certainly did not.

"Q. Did you ever break down and cry to your husband and beg him not to divorce you, and tell him if he didn't divorce you—if he would give you another trial—that you would not hold any correspondence with W. A. Whitner, and that you would rent your property in Waynesville and not come here except when he did? Answer: I never had any such conversation as you relate, in my life, with him.

"Q. Never had any occasion for any such occurrence? Answer: There was not.

"Q. He never promised to give you a probational trial if you would do any of these things? Answer: There was never a question of anything of that kind that made it necessary for such terms."

The caveators introduced two letters written by J. B. Hyatt, deceased, sent from Washington, D. C., dated 16 November, 1918, to Mrs. W. A. Whitner, Waynesville, N. C. The second letter commenced, "I wrote you Saturday night," etc. The last letter, the envelope was postmarked "Washington, D. C., 17 November, 1 a. m., 1918."

The first assignment of error is the refusal of the court below to admit these letters in evidence. The record shows: "Upon the uncontroverted identification of said letters, signatures and envelopes, the same were offered in evidence on behalf of the caveators, with the qualification and for the purposes stated by counsel for the caveators, as follows: These papers, identified by the witness, were offered in evidence solely as bearing upon the question of the testamentary capacity of John B. Hyatt, deceased, and for no other purpose. In connection with the offer of these letters, we wish to offer the calendar for the year 1918, showing that the 16th day of November was on Saturday, and the 18th of November was, of course, on the Monday following. We offer this, not for any purpose of impeachment, but solely as bearing upon the testamentary capacity of the testator."

The evidence was clearly incompetent for the purpose of impeachment, and was not offered for that purpose, but solely bearing upon the testamentary capacity of the testator.

Were they competent for that purpose?

The caveators, in their brief, say: "The wide latitude allowed in the admission of evidence in cases of this sort has been frequently declared by this Court," and cites *Rawlings, Burns,* and *McLeary cases.* We do not think these cases are in conflict with the ruling of the court.

In re Rawling's Will, 170 N. C., 61, on this question, is as follows:

"His Honor permitted the following questions to be asked and answered:

"1. In your judgment, how was her mind when you visited her in North Carolina, compared with her mind when you and she were at home together?

"2. In your opinion, do you think she was capable of disposing of her property by will and understanding the consequences and effect of her so doing?

"3. In your opinion, state whether or not she had sufficient mental capacity to know the kind and nature and value of her property, or to make disposition of it by sale and know what she was about?"

These questions are permissible, for it is well settled that a nonexpert witness, although not a subscribing witness and not present at the execution of the will, may testify to the mental condition of the testatrix if he has had adequate opportunities for observation and forming a judgment. Page on Wills, sec. 390.

In cases of this character the evidence of necessity takes a wide range, and the courts are liberal in allowing persons who are acquainted with the testatrix to testify as to their opinion of her sanity. The form of these questions is in substantial accord with the adjudications of this Court. *McLeary v. Norment,* 84 N. C., 235; *Crenshaw v. Johnson,* 120 N. C., 274; *Bond v. Mfg. Co.,* 140 N. C., 381; *Bost v. Bost,* 87 N. C., 477; *Morris v. Osborne,* 104 N. C., 609, at 612; *Clary v. Clary,* 24 N. C., 78; *S. v. Ketchey,* 70 N. C., 621.

In re Burns' Will, 121 N. C., 336, decides: "Where, on trial of an issue of *devisavit vel non,* proof of the sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one, to whom he left all of his property, is competent evidence to be passed upon by the jury as bearing upon the capacity of the testator, and hence is as much the proper subject of discussion by counsel, in the argument, as any other part of the testimony."

McLeary v. Norment, supra, decides: "One Harriet Alexander, a niece of the plaintiff, and introduced as a witness in her behalf, testified to her aunt's want of mental capacity to make the deed, and that her opinion was formed from conversations and communications between them. The plaintiff's counsel then proposed to prove those conversations and communications, in order that the jury might see whether the opinion was well founded, and the weight due to it as evidence. The court, on objection, ruled out the offered testimony, and the plaintiff excepted. It is settled in this State that witnesses, whether experts or not, who have had opportunities, from personal intercourse with another, to form an opinion of his legal competency of mind, may express their opinion and state the facts upon which it is based."

If these letters had been allowed to be introduced in evidence, they were more in the nature of contradiction to the testimony of Lucy A. Hyatt on her cross-examination, and for that purpose admittedly incompetent. From a careful reading of the letters, they show suspicion and jealousy, but the record shows that the husband and wife lived together

several years after they were written, and no suggestion other than in harmony. Under the facts and circumstances in this case, we do not see how the letters were material on the question of testamentary capacity. We think that the cases above cited by the plaintiff do allow wide latitude generally on the question of testamentary capacity, and for that reason quote them; but for the purpose offered, to show testamentary capacity, the letters go a "bowshot" beyond, and we can find no case like the facts here sustaining the caveators' contention. We think the court below made no error in excluding this evidence.

Second assignment of error. This was to the charge of the court below, which is as follows: "The burden is upon the caveators to satisfy the jury by the greater weight of the evidence that there was another will, and that the will also revoked the former will. And the burden is also upon the caveators to satisfy the jury by the greater weight of the evidence that the subsequent will was not destroyed by Hyatt."

To understand this charge we must consider the facts. The plaintiffs, caveators, were contending that John B. Hyatt had made a different will than the one offered for probate (dated March, 1911), and to which a caveat was entered by plaintiffs and which they were trying to set aside, in the present case, on the ground that John B. Hyatt did not have testamentary capacity. The plaintiffs were contending that about five or six years before the trial, Lucy A. Hyatt, the propounder of the will in controversy and beneficiary under it, told Robert E. Hyatt, one of the plaintiffs, caveators, who had a conversation with her in which "she said that John had made a will." Said that he was so thoroughly disgusted and had such a contempt for his brothers he had given the Washington property to her and the North Carolina property to my son, that is, Fred Hyatt at Greensboro.

"Q. Dr. Fred C. Hyatt? Answer, Yes.

"Q. Did you hear her make that statement to any one else? Answer, Yes, she went on up to my house and made the same statement to my wife, that he had given the property in Washington to her and the land in North Carolina to Fred."

In the instant case the propounder offered the will, dated March, 1911, of John B. Hyatt, and proved its execution by Joseph H. Bean and Mrs. Maude Bean, the witnesses to the will. The will was in the handwriting of John B. Hyatt. The plaintiffs, caveators, undertook, by the testimony of Robert E. Hyatt, as above stated, to show that there was another will and that that will revoked the will which the propounder offered for probate, and was different in terms. The North Carolina property under it was left to Dr. Fred C. Hyatt at Greensboro, and the Washington property to Lucy A. Hyatt.

The court below charged the jury that the burden was on the caveators to satisfy them by the greater weight of the evidence (1) that there was another will; (2) that the will revoked the former will; (3) that the subsequent will was not destroyed by Hyatt.

In other words, the caveators must show, by the greater weight of the evidence, that there was a later will then in existence and that that will revoked the former will of March, 1911. We think this charge correct under the facts in this case.

The case of *In re Shelton,* 143 N. C., 227, is favorable to the charge given. In that case the paper-writing executed by F. M. Shelton, 15 July, 1902, was offered in evidence as his will. The following words were written in ink on the margin thereof, to wit: "This will I this day make void and of no effect. 16 January, 1905. F. M. Shelton." *Brown, J.,* said: "When the paper-writing purporting to be the testator's will was offered by the propounder for probate he did not necessarily or in fact offer the revocatory words written on the margin of the paper containing the will. He offered only the will dated 15 July, 1902. This must necessarily be so, for the revocation is not a part of the will, and had he been compelled to offer it as a part of the will, because written on the margin of the same paper, the effect would be to destroy the very will the propounder was offering for probate. The revocation was not a cancellation technically, nor was it a mutilation, and, therefore, needed no explanation upon the part of the propounder of the will. After the propounder had offered the will and proved its execution as required by law, if the jury believed the evidence, he was entitled to a verdict to the effect that the paper-writing was the last will and testament of F. M. Shelton, unless the contestant could prove that it had been revoked. The burden of proving that the will had been legally revoked was as much upon contestant as it would have been to prove undue influence, had such been the ground of contest. It was then up to contestant to go forward with his proof and to offer the revocation in evidence and to prove its execution, or that it was all in testator's handwriting and found in a secure place, as required by statute."

The third assignment of error.

This was to the charge of the court below, which is as follows: "The law is: If a man executed a subsequent will, and at the time of his death said paper-writing cannot be found among his papers in the absence of evidence that it was lost by some parties who were interested, the presumption is he destroyed it. If he made any such paper and subsequently did destroy it, even though it may be in conflict with a former paper-writing, the former paper-writing will stand, provided he had sufficient mental capacity to execute it according to law."

From the evidence in this case we think this charge correct. Lucy A. Hyatt testified, "After the doctor left he called me and told me, 'I am not going to last long and after I pass away I want you to go to Waynesville and get the will in the safety box there and probate it in Washington and Waynesville, for I have never made any other will to my property."

Pearson, J., in *Marsh v. Marsh,* 48 N. C., 78, says: "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in anywise, affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact, that the second contained a clause of revocation, can alter the case; because that clause is just as inactive, and inoperative as the rest of it, and so continues up to the time that the whole is canceled." Jarman on Wills, Vol. 1, 5th Am. Ed., p. 295; *In re Wolfe,* 185 N. C., 565; *In re Will of William Love,* 186 N. C., 714.

A will last seen and known to have been in the possession of the decedent, which cannot be found after his death, will be presumed to have been destroyed by him and with an intention of revoking it. 14 Enc. of Ev., p. 440; *In re Hedgepeth,* 150 N. C., p. 251.

The court below from the record seems to have tried the case with care. We can find

No error.

R. B. CURLEE AND WIFE, MARY CURLEE, v. NATIONAL BANK OF FAYETTEVILLE AND A. B. McMILLAN.

(Filed 22 January, 1924.)

1. Removal of Causes — Transfer of Causes — Banks and Banking — Joinder of Parties—Good Faith.

Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business, C. S. 469, 470. As to whether the Federal statute, entitled "Locality of Actions," provides that the venue must be in the county wherein the bank was located, should the bank have been sued alone, *quere? Semble,* if so, the bank could waive this right.

2. Removal of Causes — Transfer of Causes — Statutes — Discretion — Absence of Discretion—Appeal and Error.

Under the provisions of C. S. secs. 469, 470 (2), it is within the sound discretion of the trial judge to change the venue of an action sounding

in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, *it is held*, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal.

APPEAL by defendants from *Harding, J.*, at September Term, 1923, of MECKLENBURG.

Civil action. This is an action brought by plaintiffs, residents of Mecklenburg County, N. C., against the National Bank of Fayetteville, which is a national banking corporation, organized in accordance with the laws of the United States, and A. B. McMillan, a resident of Cumberland County, N. C. The defendants are sued jointly for alleged damages to plaintiffs' financial and social standing growing out of an attachment of property owned by the plaintiffs and located in Fayetteville, Cumberland County, N. C.

The defendants, the National Bank of Fayetteville, and A. B. McMillan jointly enter a special appearance and ask for a removal of the case to the Superior Court of Cumberland County, on the following grounds:

"(*a*) That the defendant bank is a national banking corporation, organized in accordance with the laws of the United States, and without its consent is not suable in any state court other than a state court located in the county in which it has its place of business, and the place of business of the defendant bank is Fayetteville, North Carolina;

"(*b*) That the defendant, A. B. McMillan, is the cashier of said National Bank of Fayetteville, and the defense of both of the said defendants is dependent upon the books of the National Bank of Fayetteville, and said books cannot be removed beyond the limits of Cumberland County without great inconvenience, expense and annoyance to said National Bank of Fayetteville and its customers and officers, and, from the nature of this action, its maintenance in the county of Mecklenburg is contrary to public policy and the spirit of the National Banking Act of the United States, which said act is specifically urged as a cause of removal of this action in its entirety;

"(*c*) That all the witnesses of the defendants in this case and all the witnesses for the plaintiff, as far as known of these defendants, reside in the county of Cumberland, with the exception of the plaintiffs, who have recently removed therefrom."

The facts set forth in the motion for removal were supported by affidavits of John H. Culbreth, president of the said bank, and by A. B. McMillan, its cashier.

In the affidavit of the plaintiff, R. B. Curlee, he says:

"That this action was begun by process issued from the Superior Court of Mecklenburg County, N. C., the legal residence of this plaintiff

and his wife; that the said plaintiff and his wife, Mary Curlee, are now and have been residents of the county of Mecklenburg, N. C., for a period of about 12 years continuously excepting the years 1920 and 1921, when the plaintiffs lived in Fayetteville, N. C. That during the month of June, 1921, the plaintiff and his wife resumed their residence in Mecklenburg County and have resided in said county since that time;

"That the plaintiff and his wife, Mary Curlee, verily believe that the plaintiffs in this action cannot receive a fair and impartial trial of this action in Cumberland County, due to the fact that it is the home county of the defendants; that a large percentage of the residents of Cumberland County are depositors in the National Bank of Fayetteville, one of the defendants, or that their relatives or friends are depositors in said bank; that the defendant A. B. McMillan is and has been a resident of Cumberland County for a great number of years and that due to the local prejudice that naturally exists in said county in favor of the said defendants, the plaintiff and his wife could not be given a fair and impartial trial;

"That owing to the nature of this action the defendants will not be inconvenienced by a trial of this action in Mecklenburg County, since there will be few records and witnesses necessary in the trial of the action;

"That the defendant denies that there exists any such law requiring all actions against national banks, to be tried in the home county of said banks, but that Federal banking laws provide for an enlargement of the jurisdiction of state courts in actions, pertaining to national banks, so that the national banks enjoy no privilege of immunity from suit, excepting in their home counties and by virtue of their consent."

The court below at the hearing made the following order:

"The court, after consideration of the record in the cause and the argument and briefs of counsel, finds, as a matter of law, that the plaintiffs have the right to prosecute the action in the Superior Court of Mecklenburg County and that such court constitutes a proper venue for said action. The court further finds as a fact, that the ends of justice will be promoted by a trial of said cause in the Superior Court of Mecklenburg County. The court further finds as a fact, that it would not promote the convenience of the parties and witnesses to remove said cause to Cumberland County. It is thereupon ordered and adjudged that the order of the clerk of the Superior Court for Mecklenburg County removing this cause to the Superior Court of Cumberland County, be reversed, and that the said cause be remanded to the Superior Court of Mecklenburg County for trial and that said cause be not removed to the Superior Court for Cumberland County."

From the order refusing the motion to remove, the defendants excepted and appealed to this Court, and filed the following exceptions:

"1. The court erred in holding as a matter of law that, upon special appearance by defendants and request for removal by them, the plaintiffs have the right to prosecute this action in the Superior Court of Mecklenburg County, which holding is to the effect that the law of the United States does not require this cause to be tried in the home county of the National Bank of Fayetteville.

"2. The court erred in finding as a fact and holding, that the ends of justice will be promoted by the trial of the case in the Superior Court of Mecklenburg County, which finding and holding are contrary to the weight of the affidavits filed, and constitutes gross abuse of discretion.

"3. The court erred in finding as a fact and holding that it would not promote the convenience of the parties and witnesses to remove this cause to Cumberland County, which finding and holding are contrary to the weight of the affidavits on file, and constitute a gross abuse of discretion on the part of the court."

Bridges & Orr and Jas. A. Lockhart for plaintiffs.
Robinson & Robinson and Oates & Herring for defendants.

CLARKSON, J. The first exception presents a serious question of law, which has given us much concern. The plaintiffs are residents of Mecklenburg County and the defendants are residents of Cumberland County. The civil procedure of this State, applicable to the facts in this case, is as follows:

"The action must be tried in the county in which the plaintiffs, or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute.

"If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

"The court may change the place of trial in the following cases: (1) When the county designated for that purpose is not the proper one; (2) When the convenience of witnesses and the ends of justice would be promoted by the change." C. S. 469-470.

The plaintiffs, who reside in Mecklenburg County, under our law, could sue A. B. McMillan as an individual residing in Cumberland County. The plaintiffs sued McMillan and the bank, and in the complaint, in good faith (there is nothing in the record to the contrary), joined A. B. McMillan individually as a joint tort-feasor with the bank. As to McMillan, there is no doubt that the proper venue is in Mecklenburg County. This being the case, by analogy, does it not necessarily follow that the principle applies as laid down in *Fore v. Tanning Co.*, 175 N. C., 583? It is said there: "We have held, in numerous cases on this subject, that when a plaintiff has sued resident and nonresident defendants for a joint wrong, the cause of action, as a legal proposition, must be taken and construed as the complaint presents it and, in such cases, on motion to remove the cause to the Federal court by reason of the alleged fraudulent joinder of the resident defendants, the right to removal does not arise from general allegations of bad faith or fraud on the part of the plaintiff, however positive, but the relevant facts and circumstances must be stated with such fullness and detail and be of such kind as to clearly demonstrate, and 'compell the conclusion' that a fraudulent joinder has been made." This would reconcile the situation and make an orderly procedure.

In construing the National Banking Act, in reference to this matter, we do not give it the local significance that was argued before us. The authorities are conflicting. Sec. 5198 of Federal Statutes Anno. (2 ed.), vol. 6 (1918), 928 (Locality of Actions), is as follows: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

We think the construction given to this Federal act by *Church, C. J.*, 52 N. Y. Reports (Court of Appeals), 105, is the correct interpretation. He says: "The jurisdiction of the state court is denied upon the ground that the National Currency Act of Congress prohibited original jurisdiction. . . . The alleged prohibitory statute is the fifty-seventh section of the aforesaid act. 13 Stat. at Large, 99, and provides: 'That suits, actions, and proceedings against any association under this act may be had in any circuit, district or territorial courts held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. *Provided, however,* that all the proceedings to enjoin the comptroller under this act shall be had in the circuit, district or territorial court of the United

States held in the district in which the association is located.' I think the proper construction of this section is to regard the power conferred, of bringing actions against the associations in specified courts, as permissive and not mandatory. The framework of the section implies that intention. The words 'may' and 'shall' are both used; the former to confer a privilege, the latter as a mandate. It is presumed that the attention of Congress was drawn to the distinction between the ordinary import of the two words, and that they were used with reference to that distinction, and hence that, if it had been designated to limit prosecutions to the specified courts, the same word would have been employed as in limiting a particular proceeding to a specified court. There are no words of exclusion in the act, and it is a general rule as to jurisdiction, that to confer it upon one court, does not operate to oust other courts before possessing it, for the reason that concurrent jurisdiction is not inconsistent."

The following cases hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against a national bank located or doing business in another state or in a district or county other than that in which the action is brought: *Fresno Nat. Bank v. Superior Ct.,* 83 Cal., 491; *Continental Nat. Bank v. Folsom,* 78 Ga., 449; *Cooke v. State Nat. Bank,* 50 Barb. (N. Y.), 339, affirmed in 52 N. Y., 96; *Robinson v. Nat. Bank,* 81 N. Y., 385; *Talmage v. N. Y. Third Nat. Bank,* 91 N. Y., 531; *Lee v. Citizens Bank,* 5 Ohio Dec. (Reprint), 21; *Holmes v. National Bank,* 18 S. C., 31; *Montpelier First Nat. Bank v. Hubbard,* 49 Vt., 1. See, also, *Leviten v. Houghton Nat. Bank,* 174 Mich., 566.

In *Rector v. Rector,* 186 N. C., 620 (case of venue), *Clark, C. J.,* said: "The word 'may,' as used in statutes, in its ordinary sense, is permissive and not mandatory. 20 A. & E. (2 ed.), 237; 26 Cyc., 1590; Black on Statutes (2 ed.), sec. 529. 'May' is construed 'must' or 'shall' only when public rights or interests are concerned." 26 Cyc., 1592. *Johnson v. Pate,* 95 N. C., 70.

There are a large number of cases in different states holding to the contrary, and that the provisions are mandatory and not permissive.

There is no question that the exemption—if construed to be one—can be waived. *Charlotte First Nat. Bank v. Morgan,* 132 U. S., 141.

For the reasons given we think the defendants' first exception cannot be sustained.

The defendants in their brief say, "For convenience we group exceptions two and three: Gross abuse of discretion." And further say: "We realize that in seeking to reverse a trial judge on account of abuse of discretion, the appellant carries an unusual burden, but in the case at bar, we feel fully justified in asking this Court to find that there was an abuse of discretion, and that the cause should have been removed."

The court below in its judgment says: "The court after consideration of the record in the cause and the argument, and briefs of counsel, finds, as a matter of law, that the plaintiffs have the right to prosecute the action in the Superior Court of Mecklenburg County and that such court constitutes a proper venue for said action. The court further finds as a fact, that the ends of justice will be promoted by a trial of said cause in the Superior Court of Mecklenburg County. The court further finds as a fact, that it would not promote the convenience of the parties and witnesses to remove said cause to Cumberland County. It is thereupon ordered and adjudged that the order of the clerk of the Superior Court for Mecklenburg County removing this cause to the Superior Court of Cumberland County, be reversed, and that the said cause be remanded to the Superior Court of Mecklenburg County for trial and that said cause be not removed to the Superior Court for Cumberland County."

Under the statute, C. S., 470 (2), *supra,* the removal lies ordinarily in the discretion of the court below, and is not reviewable. *Perry v. Perry,* 172 N. C., 63; *Byrd v. Spruce Co.,* 170 N. C., 435.

For the reasons given, we think defendants' second and third exceptions cannot be sustained.

We can find no error, and the judgment below is

Affirmed.

JOHN A. PLOTT ET AL. V. BOARD OF COMMISSIONERS OF HAYWOOD COUNTY AND BOARD OF EDUCATION OF HAYWOOD COUNTY.

(Filed 22 January, 1924.)

1. Injunction—Appeal and Error—Findings—Review.

The presumption on appeal to the Supreme Court is in favor of the correctness of the court's findings of fact, upon supporting evidence, in declining to continue a preliminary restraining order to the hearing, and while in injunction proceedings the appellate court is not conclusively bound by such findings of the lower court, they will not be disturbed unless it is made to appear from an inspection of the record that they should be reviewed.

2. Same—Additional Findings.

Exception on appeal from the order of the judge of the Superior Court in proceedings for injunctive relief, denying the plaintiff's application to continue a restraining order to the hearing on the ground that he should have found additional facts, must generally be taken from his refusal of a request for additional findings.

3. Elections—Injunctions—Irregularities—Appeal and Error.

Mere irregularities in conducting an election wherein the electors are not responsible, such as failing to properly inquire into matters concerning their qualification to vote, and the administering the oath when such right has been questioned, is not sufficient on appeal to disturb the finding of fact by the trial judge upon conflicting evidence, that a sufficient number of duly qualified voters had voted in favor of the issue; or when the result of the election would not have been changed.

4. Appeal and Error—Injunctions—Prima Facie Case—Presumptions.

The appellant from the refusal of the trial court to continue a restraining order to the hearing, at least when this is the main relief sought, must show by his evidence a *prima facie* case entitling him to the relief demanded.

5. Schools—Consolidation of Districts—Taxation—Statutes—Special Tax Districts.

Under the provisions of the statute, the county board of education created a special taxing district, and upon a sufficient petition from the qualified voters therein, the county commissioners ordered an election for the purpose of voting a supplementary additional tax for school purposes, which was carried by a majority of the qualified voters at an election held upon the proposition: *Held*, the taxation is valid if, under the provisions of Public Laws of 1923, ch. 136, secs. 3 and 234, the board of education has assumed all indebtedness, bonded or otherwise, of the district and to pay impartially the interest and installments out of the revenue derived from the rate thus established, and the revenue is sufficient to equalize educational advantages and to pay the interest or installments on the bonds outstanding; and an exception that it was an enlargement of a special tax district to unlawfully take in those that were nonspecial tax, without submitting the question of taxation to the latter, is untenable.

APPEAL from *Bryson, J.*, at chambers, 24 October, 1923.

This is a motion upon affidavits and other evidence to enjoin the board of commissioners from signing, issuing, and delivering to the board of education or selling any school bonds purporting to be authorized by an election held in Waynesville Township on 28 July, 1923, and from levying a special school tax thereunder, and to enjoin the board of education from making application to the commissioners to issue said bonds and from issuing or selling them, from borrowing money on them, and from acquiring any property by virtue of said election.

At the hearing Judge Bryson found from the evidence the following facts:

First: That at a regular meeting of the County Board of Education of Haywood County, held on 17 May, 1923, all members being present, the following resolution was unanimously adopted:

"It was unanimously declared that Waynesville Township be, and the same is hereby created, a special school-taxing district, as provided

by sec. 234 of art. 18 of the public school laws of North Carolina of 1923. The county board of education, after due inquiry, found that it is desirable to levy a special tax for schools, in addition to the county tax for the six months school term in said Waynesville Township Special School-Taxing District, and hereby defines and describes the boundary lines of Waynesville Township Special School-Taxing District to be as follows: To embrace all territory now contained in Waynesville Township; and that this order defining said school district be spread upon the minutes."

Second: That thereafter, either in May or June, 1923, a majority of the committees and trustees of the several public schools in Waynesville Township, together with 25 or more citizens and taxpayers of Waynesville Township, qualified voters, filed petitions with the Board of Education of Haywood County, requesting that an election be held in Waynesville Township on the question of creating said township a special school-taxing district, and also for the purpose of voting bonds in the sum of $177,000 on behalf of said special school-taxing district.

Third: That the Board of Education of Haywood County duly approved, and so endorsed, said petitions and presented the same to the Board of County Commissioners of Haywood County.

Fourth: That the Board of County Commissioners of Haywood County, in regular session on 7 June, 1923, all members being present, considered said petitions, ordered elections as requested, designated voting places, appointed registrars, ordered a new registration, and notice of the election to be given, prescribed ballots, etc., a copy of such orders being contained in Exhibits A and B attached to and made a part of the answer of the Board of Education of Haywood County, and incorporated into this finding of fact in their entirety.

Fifth: That pursuant to the orders of the board of county commissioners referred to in paragraph four of these findings of fact, notices of such elections were duly published, a new registration of the qualified voters of Waynesville Township made by the registrars designated and elections held at the time and places appointed.

Sixth: That as the result of such election an accurate tabulation of the votes cast showed:

In South Ward Precinct, for or against bonds—

Total number of qualified voters	1,119
Total number of ballots cast "for the issuance of $177,000 school bonds"	550
Total number of ballots cast "against the issuance of $177,000 school bonds"	228
Majority for bonds	322
Total number voting	778

In South Ward Precinct, for local tax—

Total number of qualified voters	1,119
Voting "for local tax"	550
Voting "against local tax"	229
Majority "for local tax"	321
Total number voting	779

North Ward Precinct—

Total registration	1,126

For or against bonds—

Total voting "for the issuance of $177,000 school bonds"	632
Total voting "against the issuance of $177,000 school bonds"	103
Majority "for bonds"	529
Total vote cast	735

For or against local tax—

Total registration	1,126
Total voting "for local tax"	626
Total voting "against local tax"	107
Majority "for local tax"	519
Total vote cast	733

Seventh: That the results of said elections, so held in the North and South Ward precincts, were duly certified to the Board of County Commissioners of Haywood County by the judges and registrars of said precincts.

Eighth: That the Board of County Commissioners of Haywood County tabulated said returns, found a majority of the qualified voters of Waynesville Township voting "for the issuance of $177,000 school bonds" and "for local tax" and so declared the results of such elections as being in favor of the "issuance of bonds" and "for local tax."

Ninth: That at the date of the action of the county board of education declaring Waynesville Township a special school-taxing district (paragraph one of findings of facts) and at the date of said elections, there was situate within the territorial limits of Waynesville Township

(a) A special school-tax district coterminous with and comprising the corporate limits of the town of Waynesville; that in said district there was and still is a bonded indebtedness of $38,000.

(b) A special school-tax district comprising the corporate limits of the town of Hazelwood and certain territory contiguous thereto having a bonded indebtedness of $20,000, and State loan of $15,000.

(c) Saunook Local-Tax District.

Tenth: That a considerable, if not the larger part of Waynesville Township lies outside of the special districts of Waynesville and Hazelwood and the local-tax district of Saunook.

Eleventh: That no separate election was called or held at which the question of voting bonds in the sum of $177,000 or issuance of local tax, the subject of the election called (see paragraph four of findings of fact) was submitted to the voters of Waynesville Township residing and voting outside the territory embraced in said special and local-tax districts of Waynesville, Hazelwood and Saunook.

Twelfth: That the registrars in making said registration did not confine their work in its entirety to the designated registration places, but registered certain persons, number unknown, at other places, and in some instances placed names upon the registration books without personally interviewing the person or persons; but the court does not know, and from the evidence cannot find, who or the number of persons so recorded, or their preference as for or against the issuance of bonds or local tax, or whether such person or persons did or did not participate in said election, and this finding applies as well to those whose names were placed upon the registration books after personal interview away from the designated registration places.

Thirteenth: That no name was placed upon the registration books by the registrar until such officers had thoroughly satisfied themselves of the qualifications of such person as a legal voter, and the court cannot and does not find that any person's name was placed upon said registration books who was not eligible to registration.

Fourteenth: That a majority of those voting who resided without the boundaries of Waynesville and Hazelwood Special-Tax Districts and Saunook Local-Tax District cast their votes against the issuance of the proposed "bond issue," and against "local tax."

From these facts his Honor deduced the following conclusions of law and rendered the following judgment:

1. That the acts of the Board of Education of Haywood County in declaring Waynesville Township a special school-taxing district, and the several steps taken preliminary to the presentation of the petitions for election to the board of county commissioners, were legal, authorized by law, and in conformity to the provisions of an act of the General Assembly, session of 1923, entitled "An act to amend the Consolidated Statutes, and to codify the laws relating to public schools," being for the purpose of *creating* a special school-taxing district and not for the *enlarging* one already created. *Coble v. Comrs.*, 184 N. C., 342.

2. That the elections were regularly and legally called and held, and a majority of the qualified voters of Waynesville Township having cast their ballots "for the issuance of $177,000 school bonds," and "for local

tax," that the action of the board of county commissioners in declaring the results of said election as in favor of the issuance of the bonds and local tax was in all things valid and legal.

3. That as to the action of the registrars, the court holds (a) that at most there were irregularities committed by the registrars and not by the voters; (b) that there being no evidence to indicate the number of names so recorded, or whether they or any of them, or if any, how many were not entitled to registration, or whether any so registered voted, or if any, how many, or if voting, how they expressed their preference, concludes that in the absence of such findings of fact that such suggestions are insufficient to vitiate the declared results of the said elections.

Upon the foregoing findings of fact and conclusions of law the court considers and adjudges that the continuance of the injunction as sought by plaintiffs should not be granted, and orders a dissolution of said injunction. The plaintiffs appealed.

Smathers & Robinson and W. J. Hannah for plaintiffs.
C. N. Malone and Morgan & Ward for Board of Education.
John M. Queen for Board of Commissioners.

ADAMS, J. For the purpose of providing better school advantages in Waynesville Township, the General Assembly, at the session of 1923, passed a public-local act which was to become effective when ratified by a majority of the qualified voters of the township (P.-L. L. 1923, ch. 350); but the appellants say that the act has not been approved and is not in force, and that the election which they attack was held under the provisions of the codified laws relating to public schools. Public Laws 1923, ch. 136. The appeal will be treated upon this assumption.

The action was brought to contest the validity of an election held in Waynesville Township on 28 July, 1923, to determine whether a special tax should be levied to supplement the school fund and whether bonds should be issued for the purpose of acquiring sites and improving and erecting school buildings. The plaintiffs obtained an order restraining the levy of the tax and the issuance of the bonds and appealed from his Honor's refusal to continue the temporary order to the final hearing.

The first and second exceptions are so clearly untenable as to require no discussion, and the third relates to the legal effect of the first finding of facts and may be considered in connection with exceptions taken to the several conclusions of law. Exceptions 4-9 concern the facts as found or the failure to find additional facts. On appeal from an order refusing or continuing an injunction to the hearing, the facts as found by the lower court, while not conclusive, are entitled to just and adequate consideration. In *Hyatt v. DeHart,* 140 N. C., 270, the Court

said: "Ordinarily the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error." *Jones v. Boyd,* 80 N. C., 258; *Evans v. R. R.,* 96 N. C., 47; *Burns v. McFarland,* 146 N. C., 382; *Davenport v. Comrs.,* 163 N. C., 147; *Peters v. Highway Com.,* 184 N. C., 30; *School Com. v. Board of Education,* 186 N. C., 643. From inspection of the record we find that the facts set out in the judgment are supported by the evidence and we see no substantial reason for declining to concur in the facts as found; and in the absence of a request for additional facts an exception that other findings should have been made is generally not available to the appellants. *Dell School v. Peirce,* 163 N. C., 424. If, however, the additions on which the appellants insist were incorporated in the judgment by this Court the result would not be changed.

The appellants excepted to the second and third conclusions of law which involve the regularity and legality of the election. They insist that the law prescribing the way in which electors may register was not followed; that several persons whose names were registered were not allowed to vote; that names were registered when the required oath was not administered; that the age of the elector was frequently omitted from the registration, and that these and other irregularities vitiated the election. On the other hand there was evidence tending to show that no voter was registered to whom the oath had not been administered unless the registrar was satisfied that he was entitled to vote; that of those who were not sworn some did not vote while others voted against the bond issue and the tax, and that the oath was administered in all cases in which there was any reasonable doubt of the applicant's eligibility. On these questions the affidavits were apparently conflicting, but the judge below concluded that the irregularities were committed by the registrars, not by the voters; that there was no evidence to indicate that any one who voted was not entitled to registration or whether those alleged to have been improperly registered or denied registration voted or would have voted for or against the proposed measures, or whether the result of the election would probably have been reversed had the law been consistently observed. In other words, his Honor held that the appellants had failed to show that the result of the election would have been otherwise if the alleged irregularities had not occurred. We approve this conclusion.

In *Davis v. Board of Education,* 186 N. C., 233, holding that a mere irregularity in registration will not vitiate an election, the Court said: "The mere irregularity of an election officer who has neither rejected a

qualified voter nor admitted one who was disqualified, is ordinarily overlooked as the failure to comply with a directory provision; but it is otherwise if the irregularity is caused by the agency of a party who seeks to obtain a benefit for himself. *DeBerry v. Nicholson, supra.* Instances of the disregard by an election officer of directory provisions which ordinarily will not deprive the elector of his right to vote are an improper method of administering an oath or failure to administer it, providing ballots slightly beyond the required size, certifying the count made not by but in the presence of the officers of election, and other irregularities not affecting the result of a fair expression of the popular will. *Newsome v. Earnheart, supra; DeBerry v. Nicholson, supra; Roberts v. Calvert,* 98 N. C., 581; *Hampton v. Waldrop,* 104 N. C., 453; *Quinn v. Lattimore,* 120 N. C., 426; *Hendersonville v. Jordan,* 150 N. C., 35; *Gibson v. Comrs.,* 163 N. C., 511; *Hill v. Skinner,* 169 N. C., 409."

No complaint having been filed, the motion to continue the restraining order was heard on affidavits and record evidence. To entitle them to an injunction it was incumbent upon the appellants not only to set out specific allegations as a basis of relief, but to produce evidence which if accepted would show at least an apparent right to the relief demanded. Even where injunctive relief is not merely ancillary to the relief sought but is itself the principal relief a *prima facie* case must be shown. *Craycroff v. Morehead,* 67 N. C., 422; *Riggsbee v. Durham,* 98 N. C., 81; *Jones v. Comrs.,* 107 N. C., 248, 265; *Porter v. Armstrong,* 132 N. C., 66; *Jones v. Lassiter,* 169 N. C., 750; *Woodall v. Highway Com.,* 176 N. C., 388; *Peters v. Highway Com., supra,* 32.

Herein the appellants have failed. They have produced no evidence as to the sentiment of the electors on the questions proposed except in remote and general terms and no evidence from which we can reasonably infer that the irregularities complained of turned the election. True, there is evidence that a majority of the voters residing outside the original taxing districts voted against the proposed bonds and tax, but there is no suggestion that their ballots were not included in those returned by the judges of election in opposition to both measures. The exceptions relating to the irregularities in the election and those taken to the second and third conclusions of law must therefore be overruled.

The exception to the first conclusion of law is based on the contention that the resolution adopted by the board of education on 17 May, 1923, did not create a special-taxing district, but in legal effect merely combined two taxing districts with territory in which no tax had been voted, and that such consolidation was unlawful. The Court has decided, it is true, that where a school-taxing district has been established its boundaries may not be enlarged or extended so as to include

an adjacent nontaxing district without the approval of a majority of the qualified voters of the nontaxing territory. C. S., 5530; *Perry v. Comrs.*, 183 N. C., 387; *Hicks v. Comrs., ibid.*, 394; *Vann v. Comrs.*, 185 N. C., 168. But we do not concur in the argument that the resolution undertakes to enlarge the taxing districts or to consolidate taxing and nontaxing districts without a vote of the outlying territory contrary to the decisions just cited. In the public school law as amended since these decisions were rendered a special school-taxing district is defined as a territorial division of a county embracing more than one school district in which special taxes for schools may be voted, and a township is declared to be a territorial division or a special school-taxing district. P. L. 1923, ch. 136, secs. 3 and 234. The county board of education is authorized to define or describe the boundary lines of special districts and to approve petitions for election when endorsed by the school boards of a majority of districts within the special taxing district. Secs. 219 *et seq.*, 235 *et seq.* "If a majority of the qualified electors in the special school-taxing district shall vote in favor of the special school tax, then it shall operate to repeal all school taxes theretofore voted in any local tax or special charter district located within said special school-taxing district, except such taxes as may have been voted in said local tax or special charter district to pay the interest on bonds and to retire bonds outstanding. But the county board of education shall have the authority to assume all indebtedness, bonded and otherwise, of said local tax or special charter district and pay all or a part of the interest and installments out of the revenue derived from the rate voted in the special school-taxing district: *Provided,* the revenue is sufficient to equalize educational advantages and pay all or a part of the interest and installments on said bonds."

The provision concerning the repeal of all school taxes previously voted is similar to that of section 4 in the act which was considered in *Coble v. Comrs.*, 184 N. C., 342. There it is said: "When the boundaries are thus prescribed, a majority of the qualified voters residing in the taxing territory may determine the question of levying a tax and issuing bonds, even when the tax, as in this case, is not, in the constitutional sense, a necessary expense. The principle is analogous to that of an extension of the boundaries of a municipal corporation in which the annexed territory must share the burdens of the entire municipality (Dillon on Municipal Corporations, vol. I, sec. 106), or to the extension of the boundaries of a county, by means of which the inhabitants of the new territory may be taxed, not only to pay their proportionate part of the existing indebtedness of the county from which the new territory is taken, when such liability is retained by legislative action, but the indebtedness likewise of the county to which it is annexed,

unless otherwise provided, whether then existing or thereafter contracted. That is, tax districts may be created without special regard to the will, wish, or convenience of the people who inhabit them. *Dare v. Currituck,* 95 N. C., 190; *S. c.* (*Currituck v. Dare*), 79 N. C., 566; *Comrs. v. Bullard,* 69 N. C., 18; Cyc., 185-220, *et seq.*" Indeed, we think substantially all the questions embraced in the tenth exception were considered in that case and further discussion would result in needless repetition. Retention of the taxes voted in the taxing districts to pay the interest on the bonds outstanding or to retire them meets the requirement of Article I, sec. 10 of the Constitution of the United States. *Port of Mobile v. Watson,* 116 U. S., 289, 29 Law. Ed. 620; 10 Fed. Sts. (2d Anno. Ed.), 993, 994; *Coble v. Comrs., supra.*

While the alleged irregularities do not vitiate the election they fairly illustrate the spirit of indifference which characterizes the methods often adopted in the registration of voters. These lax methods, sometimes annoying, are always to be regretted and discouraged. We again refer to them for the purpose of emphasizing the importance of respecting the various statutes defining the qualification of voters, the prerequisites of registration, and the duty of registrars.

No error appearing, the judgment of the lower court is

Affirmed.

R. M. WELLS, EXECUTOR OF THE LAST WILL OF LAURA A. WILLIAMS v. J. B. WILLIAMS, JOHN STEPP, JULIAN STEPP, MAY SHAW, KATIE STEPP, CLYDE STEPP, MYRTLE STEPP, ROBERT STEPP AND MELVIN DEAN.

(Filed 22 January, 1924.)

1. **Wills—Interpretation—Intent.**

A will should be interpreted to conform to the lawful intent of the testator as gathered from it as a whole.

2. **Same—Life Estates—Estates in Remainder—Fee Simple—Executors and Administrators—Trusts—Discretionary Powers.**

A devise to the husband by his wife of her lands to be used and controlled by him and for him to receive the rents and profits during his life, with right to call upon the executor to sell so much of the lands as would be necessary for his maintenance in comfort during his life, and the right of the executor to sell and convey the lands, or so much thereof as may be necessary for the purpose stated, with remainder of the lands not so disposed of limited over to designated beneficiaries, does not from the intent of the testatrix, as gathered from the will, construed as a whole, vest only a life estate in the husband, unaffected by the further provisions of the will, or vest in the remaindermen an absolute

fee-simple title to all of the lands upon the death of the husband; and *Held*, further, it was in the sound discretion of the executor, fairly exercised, to make the conveyance when so called upon to do by the husband, in pursuance of the terms of the will.

APPEAL by defendants from *McElroy, J.*, at July Term, 1923, of BUNCOMBE.

Civil action brought by plaintiff against defendants to construe the will of Laura A. Williams, deceased. R. M. Wells, the plaintiff, is the executor named in the will. The will has been regularly probated in Buncombe County and the plaintiff-executor has duly qualified and entered upon the discharge of his duties as such executor. The land in controversy is about ..... acres, in Buncombe County, N. C., in or near Montreat, and near Black Mountain, N. C., which land is suitable for farming or dividing into lots for sale. Laura A. Williams, at the time of her death, left surviving her husband, J. B. Williams, and no children by the marriage. The other defendants are legatees under the will of Laura A. Williams.

The plaintiff alleges in the complaint:

"That after the death of the testator, and after the qualification of the executor, this plaintiff, as executor of the said will, has never received any personal property with which to pay the expenses of said estate, but is advised that the same were advanced and paid by the said J. B. Williams.

"That in accordance with the terms of said will the executor has permitted the said J. B. Williams to retain the household and kitchen furniture which decedent owned at the time of her death; and that the said J. B. Williams has called upon the plaintiff to sell said property, or a portion of the property and lands, described in said will, and the said J. B. Williams has submitted certificates of doctors and other statements to the effect that the said J. B. Williams is in ill health and is unable to do physical labor or earn his living, and the said J. B. Williams has requested, this plaintiff-executor, to make a deed for certain of the lands bequeathed in said will, and that the proceeds arising therefrom be turned over to the said J. B. Williams, and that the said J. B. Williams has named as the purchase price for said lands which he requests be sold, the sum of $4,400, and requests that an option be given to the end that persons taking the option may sell said lands at public auction, upon deferred payments.

"That your executor has not made any deed or deeds to said lands or any portion thereof, which the said J. B. Williams has requested be sold and deed made therefor.

"That a controversy has arisen between the parties interested in said lands and in the last will and testament of Laura A. Williams, among the legatees set forth in said will. That your executor is advised and believes, that the said J. B. Williams claims that he is entitled to call upon the executor to convey the lands or any portion thereof which he may deem advisable in order that he may be properly taken care of under the terms of said will; that the said J. B. Williams claims that it is the duty of the plaintiff-executor, upon the request of said J. B. Williams, to sell said lands for a fair and reasonable price, if he shall demand that the same be sold, and that it is only necessary for the said J. B. Williams to satisfy the executor that the said sale is necessary to obtain money to be turned over to him by said executor, when he has satisfied said executor that he needs said funds for his comfort and use as in said will provided, without it being necessary to obtain an order from the court, or consult the other legatees in said will named."

The plaintiff further alleges that as executor he is desirous of settling the estate in accordance with the true intent and meaning of the said will and testament of Laura A. Williams, and the plaintiff "prayeth the court for judgment herein directing him as executor, as to his authority in the premises and as to the rights and interest of each of the parties hereto, as to the property formerly belonging to the said Laura A. Williams, and generally in relation to the last will and testament of the said Laura A. Williams, in relation to the matters and interests therein, as well as the contentions of the parties arising out of said last will and testament."

The portions of the will of Laura A. Williams material for the decision of this case, are as follows:

"1. It is my will and desire that all my just debts shall be paid by my executor hereinafter named out of the first money which may come into his hands out of my estate, together with my funeral expenses, which shall be in accordance with the wish and desire of my husband and relatives.

"2. I give and devise to my beloved husband, J. B. Williams, all my personal property of every nature and kind to be used by him in such manner as to him may seem fit and proper.

"3. I give and devise to my beloved husband, J. B. Williams, all my real estate wheresoever situate, to be used and controlled by him and to receive the rents and profits therefrom during his natural life, with the right to my said husband, if it shall become necessary, to call upon my executor hereinafter named, to dispose of any portion of my real estate, and with full power to my said executor to make and execute deed or deeds to purchaser or purchasers, for any portion sold, and said executor to turn over to my said husband the proceeds thereof.

But upon his death should there remain any unsold portion of my real estate, then it is my will and desire that the children of my brother, Lee Stepp, and J. H. Stepp and Melvin Dean, shall share and share alike in said property, if any should remain at the death of my said husband.

"4. It is my desire that my husband shall not want for anything during his lifetime, and it is my desire that he shall use as much of my property as may be necessary to make him comfortable during his natural life."

The court below rendered the following judgment:

"That J. B. Williams is the owner of all the personal property of which the said Laura A. Williams died possessed; that he has a life estate in all of the real estate of which the said Laura A. Williams died seized and possessed; that under the wording of the will it was the intention of Laura A. Williams, deceased, that her husband, the said J. B. Williams, should not want for anything and should be maintained in comfort during the term of his natural life; that in order to carry out said intention, she, the said Laura A. Williams, authorized and empowered her executor, R. M. Wells, under said will, to sell so much of her real estate as might be required to provide for the comfortable maintenance of the said J. B. Williams; that the said J. B. Williams has the right from time to time, under the terms of said will, when and as necessary for said purpose, to call upon the said executor therein named and require him to sell and dispose of any portion of said real estate and to turn over the proceeds of same to the said J. B. Williams; that the determination of the necessity for making such sale for said purpose is lodged under the terms of the will with said executor, who, after investigation, in which he shall take into consideration any property which the said J. B. Williams might have of his own right, and a finding by him that said sale is necessary for said purpose, shall from time to time sell so much of the real estate of which the said Laura A. Williams died seized as may be required in the judgment of said executor to produce sufficient funds for the comfortable maintenance of the said J. B. Williams."

The defendants (other than J. B. Williams) excepted to the judgment and appealed to this Court and assigned errors. The only ones necessary to be considered for the determination of this case are:

"That the court committed error, in failing to provide in said judgment that a proper construction of the said last will and testament of Laura A. Williams, deceased, is that said Laura A. Williams devised to her husband, J. B. Williams, all of her real estate for and during his natural life, with remainder after his death to the children of Lee Stepp and J. H. Stepp and Melvin Dean, share and share alike, and

that said J. B. Williams acquired only a life estate in said real estate under said will, and that the said J. B. Williams only having a life estate in said real estate, the subsequent provision in the will authorizing the executor to sell and convey the land could not have the effect to deprive the remaindermen of their estate in fee simple, and if any sales of real estate were made by the executor, he could only convey a life estate to the purchaser.

"That the court committed error and said judgment is erroneous in that it provides, 'that the determination of the necessity for making such sale for said purpose is lodged under the terms of the will with said executor,' when as a matter of law said judgment should have provided in said respect that the determination of the necessity for making such sale is lodged under the will with the court."

Eugene Taylor for plaintiff-executor.
Bourne, Parker & Jones for J. B. Williams.
Stevens & Anderson for other defendants.

CLARKSON, J. We do not think that any of the exceptions to the judgment by defendants, appellants, can be sustained.

The contention of appellants is that Laura A. Williams only devised to her husband, J. B. Williams, a life estate in the land and the defendants, appellants, have a remainder in fee simple, share and share alike. That the subsequent provision in the will authorizing the executor to sell and convey the lands could not deprive the appellants, the remaindermen, of their estate in fee simple. That the necessity for making the sale under the will is with the court and not the executor.

The language of the will, in regard to this matter, is as follows: "With the right to my said husband, if it shall become necessary, to call upon my executor hereinafter named to dispose of any portion of my real estate, and with full power to my said executor to make or execute deed or deeds to the purchaser or purchasers for any portion sold, and said executor to turn over to my said husband the proceeds thereof." And further the will says: "But, upon his death, should there remain any unsold portion of my real estate, then it is my will and desire that the children of my brother, Lee Stepp, J. H. Stepp and Melvin Dean shall share and share alike in said property if any should remain at the death of my said husband." The further desire of Laura A. Williams, expressed in her will, was that her husband, J. B. Williams, should not want for anything during his life and should use as much of said property as may be necessary to make him comfortable during his life.

It is well settled that in the interpretation of wills the entire will is considered and not a part, to elucidate the intention of the testator.

This intent, as appears from the entire will, is upheld unless in violation of law. *Smith v. Creech,* 186 N. C., 187.

The executor had authority, under the clear language of the will, not only to sell and make title in fee simple but the further discretion to turn over the proceeds of the sale to J. B. Williams. This discretion must be exercised fairly and in good faith, in his best judgment and sound discretion.

In *Makely v. Land Co.,* 175 N. C., 101, it was held: "A devise of land to the wife, to have 'complete control' for her life, to sell to pay debts of testator, who was her husband, and for division among their children, with power to give any share to testator's grandchildren, subject to the support of their parents for life, 'and to sell and make deed for said property as if it were her own, and without being required to give bond,' and expressing anxiety as to two of the testator's children, with 'hope that they will come around all right': *Held,* the will conferred the power upon the wife to sell the land in her discretion and make a valid deed, not requiring the purchaser to see to the application of the purchase money."

In *Parks v. Robinson,* 138 N. C., 269, it was held: "Where a testator died, leaving a widow and minor children and by his will gave to his wife 'during her natural life and at her disposal all the rest, residue and remainder of his real and personal estate': *Held,* that the wife was given an estate for life with a power to dispose of the property in fee." *Chewning v. Mason,* 158 N. C., 578; *Troy v. Troy,* 60 N. C., 624; *Stroud v. Morrow,* 52 N. C., 463; *Marrow v. Marrow,* 45 N. C., 148.

In the case of *Maclin v. Smith,* 37 N. C., 376, the 19th clause of the will is as follows: "It is my will that my children shall be sent to such school as will enable them to acquire the best education and fit them to move in an elevated sphere, affording to each the same opportunities as near as may be." *Gaston, J.,* said: "Her father, from whose bounty all her property is derived, has ordered, by declaring it to be his will, that she shall receive the best education that could be given her, so as to fit her to move in an elevated sphere, and he has not qualified this command by any limitation, that the cost shall not exceed her income. He could do with his own as he pleased, and, having willed that this object shall be effected, he has willed that all the means, which he has put into the hands of him, in whom he confided to effect it, shall, if necessary, be devoted to that purpose. As to the objection that the expenditures are extravagant, we cannot pass upon it, upon inspection of the accounts; but we feel ourselves authorized to declare that, if they have been made by the defendant in the honest exercise of his judgment, for the purpose of fulfilling the will of the testator, they ought to be allowed him."

In the *Marrow case, supra,* the will provides: "My children I wish educated from the proceeds of the plantation and funds in hand." On page 157 the Court says: "The children are respectively to receive such an education as is suitable to their estate and condition in life in the section of the country where they reside. There is no suggestion that the education bestowed upon the plaintiff is not a suitable and proper one and that may perhaps be assumed as a standard for the younger children; but this must be left in some degree to the sound discretion of the executor."

Sawyer v. Dozier, 52 N. C., 7, relied on by the appellants, is not applicable to the facts in the present case. In that case Haywood S. Bell declined both the offices of executor and guardian, and one William Sharmon was appointed guardian in his place. The latter was, by certain proceedings in the court of equity, removed from the guardianship, and Sawyer and Sharmon then came to a settlement; and it appearing that the guardian had expended some $417 more than the income of the ward's estate, the latter gave his note for the same, and executed to John Pool a deed of trust to secure the amount. The land was afterwards sold to the defendant Dozier, and a deed was made to him by Pool, the trustee, Sharmon, the *quandom* guardian, and Sawyer, the ward. Edmund D. Sawyer is dead, and the lessors of the plaintiff are his legitimate children, and made demand before suit brought. *Pearson, C. J.,* said: "By the will of Margaret Dozier the land in controversy is given to Edmund D. Sawyer for life, remainder to his children in fee, and in the event of his death without a child him surviving, then over; and a power is given to Haywood S. Bell to sell the land, if in his opinion a sale would promote the interest of said Sawyer. The power is naked; not coupled with any estate in Bell, and as he has not exercised it, we are at a loss to conceive of any ground to support the idea that the fact of conferring this power on him, to be exercised in his discretion, for the benefit of the tenant for life, has the legal effect of enlarging the estate of the latter, so as to give him (Sawyer) or Sharmon who, for a time acted as his guardian, a right to convey the land in fee simple. Nor are we able to see how the fact that Bell is appointed by the will of Mrs. Dozier the guardian of her grandson, the said Edmund D. Sawyer, has any bearing on the question." Bell, who had the discretion under the will, refused to exercise it, by not qualifying as executor.

In citing this case, it may not be amiss to call attention to C. S., 90, which is as follows: "When any or all of the executors of a person making a will of lands to be sold by his executors die, fail or for any cause refuse to take upon them the administration, or, after having qualified, shall die, resign, or for any cause be removed from the position

of executor, or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with the will annexed, or the administrator *de bonis non,* may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold."

The decision of numerous cases in other States are in harmony with the position here taken. We think the authorities in this State fully sustain the judgment rendered by the court below. The judgment is therefore

Affirmed.

A. COLLINS v. SEABOARD AIR LINE RAILWAY COMPANY, GEORGIA & FLORIDA RAILWAY COMPANY, AND JOHN SKELTON WILLIAMS, RECEIVER.

(Filed 22 January, 1924.)

1. Carriers of Goods — Consignor and Consignee — Title — Stoppage in Transitu—Evidence.

While ordinarily a shipment by common carriage vests in the consignee the title to the goods, for the purpose of the shipment, with the right of stoppage *in transitu* by the consignor therein named, such consignor's right may otherwise be shown by transactions and agreements between the parties.

2. Same—Bill of Lading—Defenses.

The consignor of a shipment of goods by common carriage, as named in the bill of lading, had bought the goods from another for his customer, and under an agreement between him and his vendor, the goods were shipped direct to the customer, and the bill of lading was attached to a draft on the consignor so named, drawn by his vendor, which he refused to pay. The consignee paid for the goods and brought suit against the carrier after the carrier had redelivered the goods to the consignor's vendor on its demand. *Held,* the carrier may show as a complete defense to the action, that by the agreement between the consignor and his vendor, the latter and not the former was the real party in interest as the consignor of the shipment.

APPEAL by plaintiff from *Lyon, J.,* at April Term, 1923, of MECKLENBURG.

Civil action. On 4 October, 1920, the Dunham Lumber Company of Albany, Georgia, contracted to sell the Charlotte Lumber Company a car load of lumber at the price of $1,062.53, and not having the lumber on hand, contracted to purchase it from the Madison Lumber Com-

pany of Madison, Florida. On 14 October, 1920, the Madison Company delivered the lumber to the Georgia and Florida Railway Company to be carried on its lines and the lines of the Seaboard Air Line Railway Company to the Charlotte Lumber Company at Monroe, North Carolina, instead of the Dunham Lumber Company. The defendants contend that it was agreed the title to the lumber should not pass from the Madison Company until the purchase price was paid, but this was denied by the plaintiff. The initial carrier issued its bill of lading to the Madison Company, which thereupon drew a draft on the Dunham Company for the agreed price of the lumber, attaching the original bill of lading and forwarded them to a bank in Albany, Ga., for collection. The Dunham Company refused payment and the papers were returned to the Madison Company, who demanded the return of the lumber. Pursuant to this demand the Seaboard Company returned the lumber through the initial carrier to the Madison Company. The Dunham Company drew a draft on the plaintiff with bill of lading or copy attached and the draft was paid. There was evidence that the Madison Company had previously dealt with the Dunham Company and had always forwarded a draft for the purchase price of the lumber with bill of lading attached. In the shipment in question the Dunham Company requested that it be named as consignor and the plaintiff as consignee in the bill of lading, and this was done.

The suit was commenced by attachment and bond was given by the defendants.

The verdict was as follows:

1. Did Madison Lumber Company agree to sell to Dunham Lumber Company the car of lumber in question upon condition that title thereto should not pass from Madison Lumber Company until the purchase price therefor had been paid to Madison Lumber Company? Answer: "Yes."

2. If so, did Madison Lumber Company, pursuant to said agreement, obtain a bill of lading from defendant, Georgia and Florida Railway Company, in the name of Dunham Lumber Company, as consignor, and Charlotte Lumber Company as consignee? Answer: "Yes."

3. If so, did Madison Lumber Company, pursuant to said agreement and according to custom between it and Dunham Lumber Company, draw draft upon Dunham Lumber Company for the purchase price of said car of lumber and attach same to the original bill of lading covering said car of lumber, and cause same to be presented in due course to Dunham Lumber Company for payment? Answer: "Yes."

4. If so, was said draft and bill of lading duly presented to Dunham Lumber Company for payment and payment thereof refused? Answer: "Yes."

5. If so, was said draft in due course returned to Madison Lumber Company with the original bill of lading for said lumber attached because of the failure and refusal of Dunham Lumber Company to pay said draft? Answer: "Yes."

6. If so, did Madison Lumber Company, after the return of said draft and original bill of lading to it, surrender same up to defendant, Georgia and Florida Railway, and order said lumber returned to the Madison Lumber Company? Answer: "Yes."

7. If so, did said defendants, Georgia and Florida Railway and Seaboard Air Line Railway Company, upon the surrender of said original bill of lading and draft and, pursuant to order of Madison Lumber Company, return said car of lumber to said company? Answer: "Yes."

8. Did the Charlotte Lumber Company in the meantime notify the Dunham Lumber Company that it would not receive said lumber unless the contract price therefor was reduced ten dollars per thousand feet? Answer: "No."

9. If so, did Dunham Lumber Company, upon receipt of said notice, cancel the order for the car of lumber and so notify the Charlotte Lumber Company? Answer: "No."

10. Did the defendants wrongfully return said car of lumber to the Madison Lumber Company? Answer: "No."

11. If so, what damages, if any, is plaintiff entitled to recover of defendants? Answer: "None."

Henderson & Roberts for plaintiff.
Cansler & Cansler for defendants.

ADAMS, J. It is unquestionably true as a general rule that delivery of goods by the seller thereof to a common carrier for transportation to the buyer is *prima facie* a transfer of title, and such goods while in the carrier's possession are presumed to be the property of the consignee; but if before delivery to the consignee the seller notifies the carrier not to deliver the goods the carrier's duty then depends upon the actual facts as to whether the relation between the consignor and the consignee was such that delivery to the carrier constituted a transfer of title. 10 C. J., 228, sec. 317; Moore on Carriers, 188; *Aydlett v. R. R.*, 172 N. C., 47; *Gaskins v. R. R.*, 151 N. C., 19; *Mfg. Co. v. R. R.*, 149 N. C., 261; *Stone v. R. R.*, 144 N. C., 220. Such relation, it has been said, may be determined not only by the terms of the bill of lading but by the intention of the parties as expressed by their dealings and by all the circumstances of the transaction. *Emery's Sons v. Nat. Bank*, 18 A. R. (Ohio), 299.

The Madison Lumber Company delivered the lumber in question to the Georgia and Florida Railway Company and obtained from it an open bill of lading in which the Dunham Company was named as consignor and the Charlotte Lumber Company (afterwards acquired by the plaintiff) as consignee, and the appeal is based on the contention (the name of the Madison Company not appearing in the bill of lading) that the Dunham Company was the consignor, that neither the Dunham Company nor the consignee demanded a redelivery of the lumber, and that the defendants were without authority to divert or return the shipment. The contention of the defendant is diametrically the opposite. So the immediate question is this: When the Dunham Company refused to pay for the lumber and to accept the bill of lading, were the defendants justified in returning the shipment to the Madison Company upon its demand? Embraced in this question are two others: (1) May the seller retain title to goods shipped upon an open bill of lading in which his name does not appear and in which the buyer is called the consignor and the person to whom the buyer has contracted to sell is called the consignee, in the absence of a stipulation in the bill of lading that title shall be retained? (2) If so, is there sufficient evidence that the title was returned by the Madison Company?

Eminent authorities in other jurisdictions maintain the general doctrine that when a draft is attached to a bill of lading, whether the bill of lading is made out in the name of the consignor or consignee, title to goods usually does not pass to the consignee upon delivery to the carrier. The consignee cannot refuse to pay the draft and at the same time claim title to the property. *Hopkins v. Cowen,* 47 L. R. A. (Md.), 124; *Spence v. N. and W. Ry. Co.,* 29 L. R. A., 578; *Bank v. Jones,* 55 A. D. (N. Y.), 290. See, also, note to *Ramsey & Gore Man. Co. v. Kelsea,* 22 L. R. A., 428.

There is an elaborate discussion of the question in *Greenwood Grocery Co. v. Canadian County M. and E. Co.,* 2 L. R. A., N. S. (S. C.), 79, in which the material facts were as herein stated. The defendant, a corporation resident in Oklahoma, contracted to sell and deliver to the plaintiff at Greenwood, South Carolina, 250 barrels of flour at $4.50 a barrel. The defendant consigned the flour to the plaintiff and sent to the bank of Greenwood a draft on the plaintiff, with the bill of lading attached; but the draft called for payment at the rate of $5.50 a barrel instead of $4.50, the contract price. The plaintiff tendered to the bank the contract price and demanded the bill of lading, but the bank refused to accept less than the full amount of the draft and withheld the bill of lading. The plaintiff then brought suit for damages and attached the flour which was in the possession of the railroad. The defendant's position was that when the flour was delivered to the carrier,

consigned to the plaintiff, it ceased to be the property of the defendant and became the property of the plaintiff, subject only to the right of stoppage *in transitu,* and that the attachment must therefore fail.

The Court held that the effect of a bill of lading issued by the carrier on the title to the property as between the consignor and the consignee is a question of fact to be determined, not only by the terms of the paper itself, but by the intention of the parties as expressed by dealings with each other, and that when a draft for the price of the shipment is drawn on the purchaser with the bill of lading attached, the title does not ordinarily pass to him until the draft is paid. In support of this position the Court adopted the following language of *Lord Justice Cotton:* "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Liverpool Docks,* 6 Exch., 543; 20 L. J. Exch., N. S., 393; *Shepherd v. Harrison,* L. R., 4 Q. B., 196; *Ogg v. Shuter,* L. R., 1, C. P. Division, 47. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs, there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does, on payment or tender of the price, pass to the purchaser."

The reasoning and conclusion of the Court are fortified by numerous precedents which are set out in the opinion and need not be cited here. In addition the following authorities may be examined: *Emery's Sons v. Nat. Bank, supra;* note to *Chandler v. Sprague,* 38 A. D., 419; *Nat. Bank v. Dearborn,* 15 A. R. (Mass.), 92; *Grove v. Brien,* 8 Howard, 429; 12 L. Ed., 1142, and note; *Means v. Bank,* 146 U. S., 620; 36 L. Ed., 1107; *Mason v. Cotton Co.,* 148 N. C., 492; *Buggy Corporation v. R. R.,* 152 N. C., 120; *Myers v. R. R.,* 171 N. C., 190.

The plaintiff insists, however, that the principle enunciated in these cases is not pertinent for the reason that the Madison Company, at the request of the Dunham Company, consigned the lumber to the latter's customer and that the title thereby vested in the consignee named in the

bill of lading. We do not assent to this conclusion. The bill of lading did not necessarily determine the contract between the consignor and the consignee, and if treated as an admission or declaration of the consignor's purpose at the time such admission or declaration was subject to rebuttal and explanation by other circumstances attending the transaction. *Emery's Sons v. Nat. Bank, supra.* The Madison Company sold the lumber, not to the plaintiff, but to the Dunham Company, and the consignment to the plaintiff did not affect the relation existing between the vendor and the vendee. *Nat. Bank v. Shaw,* 61 N. Y., 283; *Minor v. R. R.,* 32 Conn., 91.

In view of the doctrine stated and maintained by the foregoing authorities we cannot concur in the plaintiff's argument that it was not open to the defendants to show that the title to the lumber in question was retained by the vendor and did not vest in the Dunham Company. This being so, the remaining question is whether reversible error was committed in the trial.

Among the exceptions addressed to this question only those relating to the charge require discussion; the others, we think, are clearly untenable.

His Honor instructed the jury that if a custom prevailed among lumber dealers in that territory to the effect that lumber delivered to the railroad should remain the property of the shipper until paid for, or that the shipper (Madison Company) retained the original bill of lading issued by the railroad and the shipper having the bill of lading in its possession demanded of the railroad the return of the lumber, they should answer the first issue "Yes." To this instruction the plaintiff excepted on the ground that there was no evidence of such custom, and the retention of the bill of lading and the demand for the return of the lumber did not warrant an affirmative answer to the first issue. His Honor further told the jury to answer the first issue "No" if they found from the evidence that the original bill of lading was delivered to the Dunham Company by the Madison Company or by the railroad and was attached to the draft sent to Charlotte Lumber Company for collection.

The plaintiff contended that the original bill of lading was obtained by the Dunham Company and forwarded with the draft drawn on the plaintiff, and the defendants contended that the bill of lading sent to the plaintiff was "spurious" and that the shipper retained the original in its possession.

As we understand the evidence the plaintiff does not deny that the shipper sent for collection to a bank in Albany its draft on the Dunham Company with the bill of lading attached or that the shipper demanded of the defendants a return of the lumber. These undisputed facts with the jury's finding that the original bill of lading was retained by the

shipper were sufficient to support the answer to the first issue, even if there was not adequate evidence of a general custom. It will be noted, however, that the third issue refers to a custom between the seller and the purchaser, and his Honor's instruction was evidently understood by the jury to apply to the previous dealings between these parties. 17 C. J., 520, sec. 87.

After careful and deliberate consideration of all the exceptions we find

No error.

HATTIE DAVIS, ADMINISTRATRIX OF JEFF DAVIS, DECEASED, v. THE PIEDMONT & NORTHERN RAILWAY COMPANY AND VERNON J. ROGERS, MOTORMAN.

(Filed 22 January, 1924.)

1. Railroads—Negligence—Contributory Negligence—Proximate Cause—Trespass.

Where a person was walking, in broad daylight, and for his own convenience, along a live railroad track, alert and in full possession of his faculties, and not at a public road crossing or other place where pedestrians are expected to walk, and was killed by the passing of the defendant's train, his contributory negligence is the continuing and the proximate cause of the injury in the plaintiff's action for damages, and will bar his right of recovery.

2. Same—Evidence—Nonsuit.

Where the plaintiff's uncontradicted evidence tends only to show that his intestate was negligently walking along the defendant's railroad track, and was killed in consequence of his own contributory negligence as the proximate cause of his death, a judgment as of nonsuit is properly entered, though the motorman on defendant's passing train may not have observed a town ordinance requiring a warning to be given at a public crossing, some distance from the place at which the intestate was killed.

3. Same—Last Clear Chance.

Where the plaintiff's intestate was killed by being struck by a passing train of the defendant while he was walking along the side of the defendant railroad company's track, and the evidence tends only to show that the proximate cause of his death was his negligently failing to take the precautions necessary for his own safety, under the circumstances, the evidence tending to show defendant's failure to give a warning required at a crossing some distance from the place where the intestate was killed, does not involve the issue of the last clear chance.

APPEAL by defendant from *Long, J.*, at March Term, 1923, of GASTON.

Civil action to recover damages for alleged negligent killing of plaintiff's intestate. The facts in evidence tended to show that on the morn-

ing of 11 January, 1921, about 10 o'clock, plaintiff's intestate, while walking along defendant's railroad track, several hundred feet beyond a crossing, was run over and killed by a train of defendant company, operated at the time by Vernon Rogers, a codefendant. There was evidence on part of plaintiff to the effect that the customary signals for the crossing of the public county road were not given, and also that the motorman at the time was not properly attentive to the conditions of the track ahead of his train.

There was much evidence on part of defendants in denial of this testimony of plaintiff and tending to show that the motorman was alert and attentive to his duties at the time, and that full crossing signals were given. But the jury have decided this against the defendant, and for the purposes of the disposition the Court makes of the case, plaintiff's evidence in this respect, in any event, must be accepted as true.

On denial of liability and plea of contributory negligence, etc., there was verdict for plaintiff assessing her damages, and defendants excepted and appealed, assigning errors, among others (1) the refusal of their motion to nonsuit; (2) the refusal to give defendants' prayer for instructions that if the jury should find the facts to be as testified to by witnesses, viewed in the light most favorable to plaintiff, they should answer the issues tending to fix liability for defendants, applying the prayer in terms to each of the said issues.

Felix E. Alley, R. L. Sigmon, McKinley Edwards, and Mangum & Denny for plaintiff.

W. S. O'B. Robinson, Jr., for defendants.

HOKE, J. The decisions in this State have been very insistent upon the principle that a pedestrian voluntarily using a live railroad track as a walk-way for his own convenience is required at all times to look and to listen, and to take note of dangers that naturally threaten and which such action on his part would have disclosed, and if in breach of this duty and by reason of it he fails to avoid a train moving along the track and is run upon and killed or injured, his default will be imputed to him for contributory negligence and recovery is ordinarily barred. *Wyrick v. R. R.*, 172 N. C., 549; *Ward v. R. R.*, 167 N. C., 148; *Exum v. R. R.*, 154 N. C., 413; *Beach v. R. R.*, 148 N. C., 153; *Neal v. R. R.*, 126 N. C., 634; *High v. R. R.*, 112 N. C., 385; *McAdoo v. R. R.*, 105 N. C., 140, etc.

In *Wyrick's case, supra,* it was said: "The intestate of the plaintiff was a school girl on her way to school with other girls on a dirt road alongside the defendant's right of way and, seeing the train approach, went upon the track in an intervening cut. The other children climbed

the side of the cut and avoided injury; but the intestate, while leaving the track for a place of safety, where there was sufficient room for the train to pass, caught her foot in a switch rod, and was struck by the locomotive and killed: *Held,* a motion as of nonsuit upon the evidence should have been allowed, upon the principle that the employees on defendant's train had the right to assume, up to the last moment, that the intestate, in full possession of her faculties, would leave the track and avoid the injury. In this case there was no evidence that the engineer was negligent or that he could have avoided the injury after seeing the intestate's peril."

In *Neal's case* it was said: "If plaintiff's intestate was walking upon defendant's road in open daylight on a straight piece of road where he could have seen defendant's train for 150 yards, and was run over and injured, he was guilty of negligence. And although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate."

In *Exum's case, supra,* it was said in the concurring opinion: "If it be conceded that the defendant in this case was negligent, I concur in the decision, for the reason that, accepting all of plaintiff's evidence as true, and taking every permissible inference arising on the entire testimony and which makes for his claim as established, it appears that when he was killed the intestate was voluntarily walking along the main line of defendant's track, at a time and place where a train might be expected any moment, in broad daylight, in the full possession of his faculties, and with nothing to restrain or hinder his movements, without paying the slightest attention either to his placing or surroundings. There is nothing, therefore, to qualify the obligation that was upon him to be careful of his own safety, and, to my mind, it presents a typical case of contributory negligence, negligence concurring at the very time of the impact, and recovery by plaintiff is therefore properly denied."

The position is modified in proper instances where the injury occurs at a crossing of a public road, and where the mutual rights and duties of the parties are at times of differing nature. *Johnson v. R. R.,* 163 N. C., 431; *Cooper v. R. R.,* 140 N. C., 209. And to this class of decisions may be referred the case of *Lapish v. Director General,* 182 N. C., 593. The plaintiff, when injured, was not *voluntarily* using the track for a walk-way, but, approaching the railroad at a public crossing and finding his way blocked by a train of defendant company, in the endeavor to walk around this obstruction he was momentarily upon the track and was run on and hit by another train coming around a sharp

curve without warning of any kind. As said in the concurring opinion of *Walker, J.*, "Defendant's engine approached him suddenly, and without warning, and under circumstances and surroundings requiring notice of its approach to be given. He was not therefore a mere trespasser or licensee, but acting in the exercise of his legal right."

Another qualification is presented when one is required to be on or upon the track in the line of his duties, particularly when being performed for the company. In such case and in exceptional instances the question of contributory negligence may be for the jury. See *Sherrill v. R. R.*, 140 N. C., 252, cited and approved in numerous cases since, as in *Wyne v. R. R.*, 182 N. C., 253; *Perry v. R. R.*, 180 N. C., 290; *Elliott v. Furnace Co.*, 179 N. C., 145; *Goff v. R. R.*, 179 N. C., 221, etc.

And so, in *Morrow v. R. R.*, 147 N. C., 623, where a pedestrian was using the track as a walk-way in the city of Hickory, at a place where it was customary so to use the track, and was run on by the company's engine in the night-time, and injured, there was evidence tending to show that the engine in question had no lights and had given no signal warning of any kind, it was held that the question of contributory negligence was for the jury. Approved in principle in *Norris v. R. R.*, 152 N. C., 512. In those and other like decisions the pedestrian by default of the company was in a position where "to look and to listen," the ordinary way that the average man avoids the danger in such instances was not likely to avail him, and the cases were therefore excepted from the general principle.

Again, in *Tally's case*, 163 N. C., 581, the intestate was killed while using as a walk-way the side-track at Pelham, N. C., a station of the Southern Railway. It was proved among other things that it was the schedule time for the arrival of the passenger train and awaiting passengers were standing on this side-track purposed to take the incoming train. It was shown further that this passenger train had not once in seven years approached the station on this side-track, a fact known to intestate, but on this occasion some one without authority had changed the switch, which suddenly and unexpectedly threw the incoming train on this side-track, and intestate, a local resident, as stated, using said track just above the station was run over and killed. The company was held for negligence because the engineer if properly attentive should have noted the change by the signal lights at the switch, and under these exceptional circumstances it was held that the question of contributory negligence was for the jury. In that case the Court was of opinion that on the facts presented this side-track could in no proper sense be considered as a live track within the meaning of the principle, which carried a recovery as a conclusion of law.

But none of these excepted cases will serve to support the present suit, wherein it appears that plaintiff, an alert and vigorous man, was, at the time and for his own convenience, using a track of defendant company as a walk-way at ten o'clock in the morning, with nothing whatever to obstruct his view, and on which a train of defendant might at any time be reasonably expected. In such case the claim comes directly within the decisions cited in support of the position generally prevailing, notably that of *Exum's case,* and wherein it was said: "There is nothing to qualify the obligation that was upon him to be careful for his own safety, and presents a typical case of contributory negligence, negligence concurring at the very time of the impact."

Nor is there any evidence calling for or permitting the application of the doctrine of the "last clear chance," an issue that has been found for the plaintiff. That is a principle fully recognized in this jurisdiction, but in order to its proper application it must appear that the claimant, in a case of this kind, originally guilty of contributory negligence in going on the track, is down and helpless, or apparently in such a position of peril that ordinary effort on his part will not avail to save him. If defendant's agents operating a train saw, or by the exercise of proper care could have seen and noted, the claimant's position, and negligently failed in the exercise of reasonable care to do what was required under conditions presented to avert the injury, in such case this last breach of duty will be regarded as the sole proximate cause of the injury, and the original negligence of the claimant in going on the track will not be allowed to affect the result. *Snipes v. Mfg. Co.,* 152 N. C., 44, 46, 47, citing the cases of *Sawyer v. R. R.,* 145 N. C., 24 and 27; *Clark v. R. R.,* 109 N. C., 443-444; *Bullock v. R. R.,* 105 N. C., 180.

In *Sawyer's case* the principle applicable is stated as follows: "A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury; and, although the plaintiff, in going on the track, may have been negligent, when he was struck down and rendered unconscious by a bolt of lightning, his conduct as to what transpired after that time was no longer a factor in the occurrence, and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury, so its negligence became the sole proximate cause of the injury; and the act of the plaintiff in going on the track, even though negligent in the first instance, became only the remote, and not the proximate or concurrent cause."

In *Snipes' case* the claimant, a fireman, was neither unconscious nor entirely helpless, but the engine had stopped and the engineer and fire-

man went forward looking at the section hands repairing the track and a trestle. The fireman was sitting down on the ties with his feet and his legs partly hanging down between the ties of the trestle. The engineer, unobserved by the fireman, went back and started the engine without proper signal, and the fireman was run on and injured before he could extricate himself: *Held,* a case calling for the application of the doctrine of the last clear chance, and the opinion cites from *Clark's* and *Bullock's cases* as follows:

"In *Bullock's case, Avery, J.,* for the Court, said: 'It is the duty of an engineer, when running his engine, to keep a constant lookout for obstructions, and when an obstruction is discerned, no matter when or where, he should promptly resort to all means within his power, known to skillful engine drivers, to avert the threatened injury or danger. Woods' R. L., sec. 418, p. 1548; *R. R. v. Williams,* 65 Ala., 74; *R. R. v. Jones,* 66 Ala., 507. If the engineer, so soon as he discovered that the wagon was detained upon the track and could not, for the time, get out of the way, or so soon as with proper care and watchfulness he would have had reason to think such was its condition, had used every means and appliance within his power to stop the train, the defendant would not have been liable. But the judge omitted to tell the jury that it was negligence on the part of defendant, if the engineer could have seen, by watchfulness, though he did not in fact see, that the road was obstructed in time to stop his train before reaching the crossing. *Carlton v. R. R.,* 104 N. C., 365; *Wilson v. R. R.,* 90 N. C., 69; *Snowden v. R. R.,* 95 N. C., 93. The defendant could not complain of this error. It is true that, ordinarily, an engineer has a right to assume that one who has time will get out of the way, but he is not warranted in acting upon this assumption after he has reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals.'

"And in *Clark's case, supra,* the Court said: 'It is settled law in this State that where an engineer sees that a human being is on the track at a point where he can step off at his pleasure and without delay, he can assume that he is in full possession of his senses and faculties, without information to the contrary, and will step aside before the engine can overtake him. But where it is apparent to an engineer, who is keeping a proper lookout, that a man is lying prone upon the track, or his team is delayed in moving a wagon over a crossing, it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed,' citing *Deans v. R. R.,* 107 N. C., 686; *Bullock v. R. R.,* 105 N. C., 180."

But in the present case there is nothing to show that the intestate was in any way hindered or that there was anything to prevent his avoiding the collision if he had been properly attentive to the threatening conditions in which he had placed himself. And the facts which establish contributory negligence coming from plaintiff's own evidence, and there being nothing to the contrary shown anywhere in the record, it is in accord with our practice that a motion for nonsuit may be entertained and allowed. Speaking to the question in the recent case of *S. v. Fulcher,* 184 N. C., 665, *Stacy, J.,* said: "Originally, under this section (C. S., 567), there was considerable doubt as to whether a plea of contributory negligence, the burden of such issue being on defendant, could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of plaintiff is established by his own evidence, as he proves himself out of court," citing *Wright v. R. R.,* 155 N. C., 329; *Horne v. R. R.,* 170 N. C., 660.

In the case of *Lapish v. Director General, supra,* as heretofore stated, the injury was treated as virtually occurring at a public crossing, and some of the facts affecting the issue were in dispute.

On the record, we are of opinion that there was error in denying defendant's motion to nonsuit, and this will be certified that the verdict and judgment be set aside and the case nonsuited.

Reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. W. A. NICHOLS.

(Filed 22 January, 1924.)

1. **Railroads—Pleadings—Counterclaims—Torts.**

   A counterclaim is not permissible for a distinct and independent tort, and where a railroad sues to recover a part of its right of way from one who is alleged to have wrongfully appropriated it, a counterclaim for a trespass by the plaintiff on a different tract of defendant's land is not maintainable.

2. **Same—Courts—Jurisdiction—Appeal and Error—Objections and Exceptions—Demurrer.**

   The matter of setting up in the answer an improper counterclaim is not jurisdictional, and the plaintiff may waive his right to except thereto by proceeding throughout the trial without objection; and a demurrer entered upon the ground that the evidence to sustain the counterclaim was insufficient, does not meet the requirement.

3. **Railroads—Trespass—Permanent Structures — Damages — Limitation of Actions—Actions.**

   The present owner of land may recover of a railroad company, under the provisions of C. S. sec. 440 (2), the entire damages to his land caused

by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass.

4. Appeal and Error—Instructions—Record—Presumptions—Burden to Show Error.

The burden is on the appellant to establish substantial error; and where the charge of the court is not set up in its entirety in the record, an exception that it did not sufficiently cover a phase of the controversy arising upon the evidence, is untenable, the presumption being to the contrary.

APPEAL by plaintiff from *Lane, J.*, at June Term, 1923, of CHEROKEE.

Civil action tried on a principal cause of action by plaintiff and counterclaim thereto set up by defendant. The principal action by plaintiff is to establish ownership and to recover possession of a narrow strip of land at Culberson, N. C., acquired by plaintiff company under deeds conveying a right of way to plaintiff or its predecessors in title, and including the station grounds at said place, some portion of which was withheld by defendant. Defendant denied the wrongful possession of the land claimed by him, and by way of counterclaim set up a cause of action against plaintiff company for damages done to other lands of defendant lying near to the road, by reason of plaintiff or its predecessors having wrongfully diverted the surface water on plaintiff's land by means of its culverts and drains, permanent in nature, and whereby the lands of defendant were greatly damaged. Plaintiff replied to the counterclaim, set up a judgment claiming that defendant was thereby estopped from disputing plaintiff's title to its right of way, and denied also that it had wrongfully diverted water on defendant's lands as alleged. The case was thereupon submitted to the jury, on both causes of action, without objection so far as noted, and on issues submitted, verdict was rendered as follows:

"1. Is the plaintiff, Louisville and Nashville Railroad Company, the owner of the 200-foot strip of land described in the complaint? Answer: 'Yes.'

"2. Is the defendant, W. A. Nichols, in the unlawful possession of a part of said strip of land, as alleged in the complaint? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover from said defendant on account of such possession? Answer: '$1.'

"4. Did the plaintiff company wrongfully divert surface waters and cause same to be discharged upon the lands of defendant, referred to as the Kilpatrick lands, as alleged in the answer? Answer: 'Yes.'

"5. What damage, if any, is defendant Nichols entitled to recover of the plaintiff on account of such diversion? Answer: '$100.'"

Judgment for plaintiff on the principal action, from which there was no appeal, and for defendant for damages assessed at $100; from which said judgment plaintiff excepted and appealed.

M. W. Bell for plaintiff.
John H. Dillard and Thomas J. Hill for defendant.

HOKE, J. Under our statutes and decisions construing the same, a counterclaim is not permissible for a distinct and independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to plaintiff, a counterclaim for a trespass by plaintiff on a different tract of land belonging to defendant is not maintainable. *Street v. Andrews,* 115 N. C., 417, 422; *Bazemore v. Bridgers,* 105 N. C., 191; C. S., 521, 522.

While this is the accepted principle, it is not a jurisdictional question, and the approved decisions on the subject are to the effect that the objection may be waived and will be considered as waived unless specifically raised in the pleadings or insisted on when the evidence is offered in support of the counterclaim, and more especially is this true where the cases have been "tried throughout on the theory that it is a proper counterclaim." *Richardson v. Anderson,* 109 Md., 641; *Stensguard v. Real Estate Co.,* 50 Minn., 429; 2 R. C. L., 877, 878; 34 Cyc., 649, 650; *Brown v. Chemical Co.,* 165 N. C., 421.

True, in the present case, there was motion to nonsuit, but this, termed under our statute a demurrer to the evidence, was evidently made on the general ground that defendant's evidence was insufficient to support his counterclaim, and a perusal of the record will show that the case throughout was dealt with as if the counterclaim was one properly to be considered, and issue was joined and the case tried on that theory. In that aspect we find no error in the record that will justify the Court in disturbing the result.

Our statute, C. S., 440, subsec. 2, as a statute of limitations on claims of this character, fixes the period of five years for trespasses arising from the permanent structures or proper repairs of a railroad, the statute commencing to run from the time when the structure causes substantial injury to claimant's property. *Campbell v. R. R.,* 159 N. C., 586. And this statute contains provision also that the jury shall assess the entire amount of damages a party aggrieved shall be entitled to recover by reason of such a trespass. In construing this statute we have held that the grantee in fee of the property may maintain this action for the entire damage unless a former owner had instituted action

therefor before the sale and conveyance. *Caveness v. R. R.,* 172 N. C., 305. In that case the positions pertinent are given as follows:

"The act of a railroad in entering upon and constructing and operating its railroad over a street abutting the lands of another, without having resorted to condemnation proceedings or having otherwise acquired the right, is a continuing trespass upon the lands of the abutting owner, and the right to recover permanent damages therefor will pass to the grantee of the owner, when no other provision has been made in the deed, unless the grantor has theretofore instituted his action to recover them.

"Where a railroad company, without authority, enters upon a street abutting the lands of private owners and constructs and operates its railroad thereon, the owner, by instituting his action to recover damages, confers the right to the easement to the railroad company, upon payment and tender, etc., by the company of the amount awarded by the appraisers; and where no action has been instituted, and the lands have been conveyed after their appropriation and use by the company, the right to recover permanent damages therefor inures to him who first institutes his action pending his ownership, unless there is a different provision in the conveyance."

On perusal of the record it appears that defendant, who sets up the counterclaim, was, at the time of action commenced and counterclaim made, and is now, the owner of the property. The pleadings are broad enough to present a claim for the permanent damages and the evidence, if accepted, sufficient to maintain it; and, as stated, the exceptions fail to disclose that any reversible error has been committed.

The exception to a clause of his Honor's charge on the question of damages cannot be sustained. The instruction is correct as far as it goes, and the entire charge not being sent up, the Court will presume that such charge has dealt adequately with the questions, the burden being on the appellant to establish substantial error. *Quelch v. Futch,* 172 N. C., 316; *Baggett v. Lanier,* 178 N. C., 129; *Pennington v. Tarboro,* 184 N. C., 71.

On careful consideration of the case as now presented the Court is of opinion that the judgment should be affirmed, and it is so ordered.

No error.

THE ASHEVILLE TIMES COMPANY v. THE ASHEVILLE TYPOGRAPHICAL UNION, No. 263, FRANK J. TORLAY ET ALS.

(Filed 22 January, 1924.)

Injunction—Labor Unions—Unincorporated Companies—Individuals.

This appeal from the order of the trial judge vacating a restraining order against a labor union and certain individual members thereof is controlled by The Citizens Company against the same Union, *et als.*, *ante*, 47.

CIVIL ACTION. Restraining order heard before *McElroy, J.*, at chambers. From BUNCOMBE. Appeal by plaintiff from order vacating restraining order.

Jones, Williams & Jones and Mark W. Brown for plaintiff.
Gallatin Roberts, George Pennell, and J. W. Haynes for defendants.

CLARKSON, J. For the reasons given in the case of *The Citizens Co. v. Asheville Typographical Union, No. 263, Frank J. Torlay, and others,* the judgment of the court below dissolving the restraining order against the Asheville Typographical Union, No. 263, is affirmed. As against the individuals set out in the complaint, the judgment is reversed and modified in accordance with that opinion.

The restraining order under the judgment of the court below is continued against the individual defendants to the hearing and modified in accordance with that opinion.

Affirmed as to the Asheville Typographical Union, No. 263.

Reversed and modified as to the individuals, Frank J. Torlay and others.

STANDARD OIL COMPANY ET AL. v. W. T. HUNT, F. S. ROYSTER GUANO COMPANY, ET AL.

(Filed 22 January, 1924.)

1. Evidence—Nonsuit.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and reasonable inference to be drawn therefrom. C. S., 567.

2. Fraud—Definition—Equity.

Fraud, actual and constructive, is so multiform as to admit of no general rules or definitions, and it is no part of equity doctrine to define it.

3. Same — Debtor and Creditor — Mortgages — Judgments — Unsecured Creditors.

Evidence in this case that one conducting a small store gave certain creditors of his mercantile business mortgages in comparatively large sums to secure a preëxisting debt, and that while the store had been closed for some time, a fire occurred, etc., *is held* sufficient in a judgment creditor's suit to set aside the mortgages as to the unsecured debts, and show that they had been given and received with the intent to defraud those who were not thus secured in their debts against the owner.

APPEAL by defendant, F. S. Royster Guano Company, from *Lane, J.*, at Spring Term, 1923, of CLAY.

Civil action in the nature of a judgment creditors' bill brought to set aside two mortgages, one given to F. S. Royster Guano Company and the other to Cherokee Hardware Company by W. T. Hunt and wife, with the intent, it is alleged, to hinder, delay and defraud Hunt's other creditors, plaintiffs herein.

Upon denial of plaintiffs' allegations and issues joined, there was a verdict and judgment in favor of plaintiffs, from which the defendant, F. S. Royster Guano Company, appealed.

John H. Dillard, Anderson & Gray, and Thos. J. Hill for plaintiffs.
D. Witherspoon and Moody & Moody for Royster Guano Company.

STACY, J. The single question presented by this appeal arises upon the appellant's demurrer to the evidence and motion for judgment as of nonsuit made under C. S., 567. Viewing the evidence in its most favorable light for the plaintiffs, the accepted position on a motion of this kind, we find the following facts sufficiently established, or as reasonable inferences to be drawn from the testimony:

1. From 1919 to 1922 W. T. Hunt was engaged in the mercantile business at Hayesville, N. C. He carried a small stock of general merchandise, variously estimated to be worth from $1,000 to $2,500, and he also ran a gasoline filling station in connection with his store. This was of small value.

2. On 31 March, 1921, Hunt and wife executed to F. S. Royster Guano Company a mortgage to secure the payment of a preëxisting debt amounting to $3,950.97.

3. On 6 April, 1921, Hunt and wife executed a deed of trust in favor of the Cherokee Hardware Company to secure a preëxisting debt amounting to $704.69.

4. On 8 April, 1921, Hunt executed to W. L. Matheson, one of the plaintiffs herein, a note for $1,050, secured by mortgage on a town lot worth from $300 to $500, stating at the time that he wanted to secure Matheson as far as he was able to do so.

5. It was admitted on the hearing that, at the time of the execution of these mortgages, W. T. Hunt was indebted to the plaintiffs as follows: To the Standard Oil Company in the sum of $203.40, with interest from date until paid; to W. L. Matheson, the sum of $1,050, with interest from 24 June, 1921, until paid; to C. M. McClung & Co. in the sum of $468.37, with interest from 31 May, 1921, until paid, and to W. N. Moore, guardian of Morris Moore, an infant, in the sum of $750 on which $100 was paid 10 January, 1922, with interest on said $750 from 25 October, 1919, till paid, and to the Clay County Bank in the sum of $524.09, with interest from 20 June, 1922, until paid. There was further evidence tending to show that Hunt was insolvent and unable to meet his obligations at this time.

6. W. T. Hunt remained in business for a year or more after the execution of the mortgage above mentioned, when his store was destroyed by fire. His former partner testified: "A great deal of the time Hunt's store was closed before the fire. The filling station he had at his hardware store he was not using at the time of the fire."

Upon these, the facts chiefly pertinent, we think the jury was amply justified in finding, as they did, that the mortgages in question were given with intent to hinder, delay and defraud the plaintiffs herein, and that the F. S. Royster Guano Company and Cherokee Hardware Company had knowledge of such purpose and participated therein. On a motion to nonsuit, the evidence is to be taken in its most favorable light for the plaintiffs, and "they are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *Christman v. Hilliard,* 167 N. C., p. 6.

Fraud, actual and constructive, is so multiform as to admit of no rules or definitions. "It is, indeed, a part of equity doctrine not to define it," says *Lord Hardwicke,* "lest the craft of men should find a way of committing fraud which might escape such a rule or definition." Equity, therefore, will not permit "annihilation by definition," but it leaves the way open to punish frauds and to redress wrongs perpetrated by means of them in whatever form they may appear. The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties. *Grove v. Spike,* 72 Md., 300.

The case was properly submitted to the jury, and there is no error appearing on the record. The verdict and judgment will be upheld.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1924

CORBETT & MOORE ET AL. v. JOHN BARTON PAYNE, AGENT UNITED STATES RAILROAD ADMINISTRATION; EAST CAROLINA RAILWAY COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 February, 1924.)

Carriers—Railroads—Bills of Lading—Stipulations as to Commencing Suit—Actions—Evidence—Nonsuit.

The law imposes a duty upon a common carrier to transport goods it has accepted safely, and to deliver them within a reasonable time; and under its contract of shipment, providing that suits for loss, damage or delay shall be instituted only within two years and one day after a reasonable time for delivery has elapsed, and the evidence in the action tends only to show that this had not been done, defendants' motion as of nonsuit thereon is properly granted.

APPEAL by plaintiffs from *Connor, J.*, at November Term, 1923, of EDGECOMBE.

Civil action to recover the value of four bales of cotton lost in transit.

On 10 November, 1919, Corbett & Moore delivered to the East Carolina Railway Company at Macclesfield, N. C., for shipment to J. W. Perry & Co., at Norfolk, Va., nineteen bales of cotton under a contract of shipment containing the following provision: "Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

Fifteen bales of this shipment were delivered in due course, and about which there is no complaint. Claim for the four bales was duly filed on 5 May, 1920.

The plaintiff contended and offered evidence tending to show that the four bales, for which suit is instituted, were retained by the East Carolina Railway Company on its platform at Macclesfield, N. C., until the summer of 1920; that it then shipped them to Farmville, N. C., and later consigned them, or four substituted bales, to J. W. Perry & Co., which were delivered 25 September, 1920.

It is agreed that ten days was a reasonable time within which the shipment of 10 November, 1919, should have been delivered, and it appeared from the plaintiffs' evidence that this action was instituted 25 February, 1922, more than two years and three months after the expiration of a reasonable time in which to make delivery.

At the close of the plaintiffs' evidence, on motion of the defendants, the court entered judgment as of nonsuit, upon the ground that suit was not instituted within the time limited in the contract.

W. O. Howard for plaintiffs.

John L. Bridgers for East Carolina Railway.

F. S. Spruill and M. V. Barnhill for Payne and Atlantic Coast Line Railroad Company.

STACY, J. Construing a similar limitation in an interstate bill of lading, with respect to when suit should be brought, the following conclusion was reached in the case of *Holmes v. R. R.*, 186 N. C., p. 63:

"We think the provision now under consideration must be held to mean that suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, when delivered within a reasonable time, or, in case of failure to make delivery within a reasonable time, then within two years and one day after a reasonable time has elapsed. Without regard to the contract of carriage, when a common carrier takes into its possession goods for transportation, the law imposes upon the carrier the duty (1) to transport said goods safely, and (2) to deliver them within a reasonable time. Therefore, the stipulation inserted in each of the instant bills of lading should be interpreted, not only with reference to the language used, but also with regard to the law bearing on the subject of the contracts."

To like effect is the decision in *Rogers v. R. R.*, 186 N. C., 86.

Upon authority of these cases, the judgment of nonsuit entered below must be upheld.

Affirmed.

A. D. HARRIS v. J. E. SLATER.

(Filed 20 February, 1924.)

Admiralty—Negligence—Collisions—Pilots — Contributory Negligence — Evidence—Directing Verdict—Statutes—Appeal and Error.

Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of C. S., 6985; and, under the Federal statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons.

APPEAL from *Grady, J.*, at February Term, 1923, of CRAVEN.

The plaintiff was the owner of the "Lallie," a boat propelled by gas, which he operated as a common carrier of passengers and freight for hire. In September, 1921, while proceeding along Swift Creek, between New Bern and Vanceboro, the boat struck a log and was so badly damaged that it listed and soon afterwards went to the bottom of the stream and was lost.

The defendant was engaged in the lumber business at New Bern and had a raft of logs on Swift Creek, where the boat was injured. The plaintiff alleged that when the boat approached the raft the defendant's employee negligently pulled the logs away from the right shore to make a passage for the boat, and thereby caused the collision and injury. The defendant denied negligence and pleaded contributory negligence on the part of the plaintiff. At the time of the injury the plaintiff, who had a master's license, was operating the engine, and Cahoon, his mate, was steering the boat. Cahoon was a hired hand, not a licensed pilot, and had been running on the boat about twelve months. The issues were answered as follows:

"1. Was plaintiff's boat sunk by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, did plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: Yes.

"3. What damage, if any, is plaintiff entitled to recover from defendant? Answer: Nothing."

Judgment. Appeal by the plaintiff.

D. L. Ward, Guion & Guion, and S. F. Morris for plaintiff.

Moore & Dunn for defendant.

PER CURIAM. Upon the second issue his Honor instructed the jury that, according to the plaintiff's admission, he was negligent, because he operated the boat without a licensed pilot. This instruction was erroneous, considered with reference either to the State or the Federal law. All vessels passing through the inland waterway of the State are exempt from the pilot laws of North Carolina, subject to the proviso in section 6985 of the Consolidated Statutes. His Honor no doubt had in mind the provisions of the Federal statutes. The first clause of section 8187 of the Compiled Statutes (R. S., 4496-4500) requires a licensed engineer and a licensed pilot for ferry-boats, canal boats, yachts or other small craft of like character propelled by steam, and the next clause relates to certain vessels of more than fifteen gross tons, but whether the plaintiff's vessel was of this class was to be determined by the method prescribed by law. U. S. Compiled Sts., secs. 7725, 7730. The plaintiff's assertion that his boat "would carry thirty tons" did not necessarily imply that the actual tonnage was "above fifteen tons burden" when measured in accordance with the statutory provision. Section 7730, *supra.*

Whether the answer should have set up this particular phase of contributory negligence is a question which was not discussed.

For error in the instruction there must be a

New trial.

REBECCA J. FORBES ET AL. V. E. L. DEANS ET AL.

(Filed 20 February, 1924.)

1. Bills and Notes—Fraud—Burden of Proof.

Where the defendant admits the execution of his note sued on, and defends upon the ground of fraud, the burden is on him to prove his defense.

2. Evidence—Directing Verdict.

Upon plaintiff's motion for a direction of the verdict upon the evidence, the evidence will be taken in the light most favorable to the defendant, giving him the benefit of all reasonable inferences therefrom.

3. Vendor and Purchaser—Deeds and Conveyances—Warranty—Fraud—Questions for Jury.

The plaintiff contracted to sell the defendant his farm, and implements therefor, in contemplation of the latter's possession for the purpose of cultivating it, and delivered to him a deed, with full covenants and warranty. In an action to recover upon the purchase-money notes there was evidence tending to show that defendant was induced to purchase by

plaintiff's false representations as to existing liens on the land, which resulted in a receiver, appointed at the suit of the lienors, and the prevention of the defendant's possession and the loss of his title: *Held*, sufficient to take the issue of fraud to the jury.

APPEAL by plaintiffs from *Bond, J.*, at September Term, 1923, of PASQUOTANK.

Civil action to recover $10,300, with interest, upon a note executed by the defendants. Defense is interposed upon the ground that the note was procured by fraud, and that there has been a total failure of consideration.

From a verdict and judgment in favor of defendants the plaintiffs appealed.

Aydlett & Simpson for plaintiffs.
P. W. McMullan for defendants.

STACY, J. Plaintiffs' chief exception, as stressed on the argument and in their brief, is the one addressed to the refusal of the court to grant their motion for a directed verdict (not motion for nonsuit, *Lester v. Harward,* 173 N. C., 83), upon the ground that no sufficient evidence of fraud had been adduced or offered on the hearing. The defendants, having admitted the execution of the note, thereby assumed the burden of establishing their defense.

On 14 September, 1920, plaintiffs executed to the defendants a deed for the "Rufus Eason" farm, in Gates County, including all crops and all personal or chattel property thereon or used in connection therewith, except the household and kitchen furniture. This deed contained full covenants of seizin, warranty against encumbrances, except those mentioned in the note sued upon. Defendants paid $500 cash and executed the note sued on for the balance of the agreed purchase price. At the time of this purchase defendants estimated the crops and chattel property to be worth $3,500, and there was testimony tending to show that the same was worth from $2,000 to $3,000.

The defendant Deans had secured in June prior to this sale an option upon said farm at a higher price, in which option defendant McDaniel was not interested, and which was never exercised by Deans, who was insolvent. McDaniel did not become interested until September, 1920. On the day of the execution of the note and deed it was agreed that the plaintiff Forbes should retain possession of the farm until 15 October, in order to give plaintiffs time to secure another place and defendant McDaniel time to arrange his affairs at his home in Northampton County. McDaniel thereupon returned home and rented out all of his

land in Northampton for a period of five years, with the intention of returning and taking possession of the "Eason Farm" on 15 October.

Shortly thereafter McDaniel was served with summons in a suit instituted by Mrs. Alphin, Duke Eason, and one Jones against McDaniel, Deans and the plaintiffs to have a receiver appointed for said farm, crops and chattel property, in order to secure the payment of certain liens thereon previously created by the plaintiffs in favor of said Mrs. Alphin, Eason, and Jones.

Returning to Gates County, McDaniel was informed by the plaintiff Forbes that a receiver had been appointed, who had charge of everything, and that he, Forbes, could do nothing. Thereupon, McDaniel and Deans, upon leave obtained, intervened in the receivership suit and filed a complaint, asking the identical relief prayed by them in this suit. A receiver was appointed in the suit of Mrs. Alphin and others, and he immediately assumed and retained charge of all the property conveyed to defendants.

At the time of the transaction above mentioned, defendants allege they were induced to buy by the representations of plaintiff Forbes, upon which they relied—(1) that he owned all the crops on said farm, whereas in truth and in fact two tenants, John Eason and one Briggs, were cultivating portions of the land for a money rent which had been paid; (2) that plaintiffs would discharge the $500 note, with interest, due Jones, and the $1,350 note, with interest, due Duke Eason, secured by a deed of trust to the latter, whereas in truth and in fact plaintiffs had no present intention of discharging said notes, as shown by the fact that he did not discharge them, by his contention upon the trial that he did not owe them, and by the allegation of his reply to the effect that if defendants had paid the note sued on, plaintiffs would have discharged all obligations against the farm except the notes due Jones and Duke Eason; and (3) that, with the exception of said deed of trust to Duke Eason and the liens assumed by defendants in the note sued on, there were no other encumbrances upon said property, whereas in truth and in fact Mrs. Alphin held a note for $500, with interest, secured by a mortgage or deed of trust upon said farm.

The jury answered the issue as to fraud in favor of defendants, and judgment was entered accordingly.

Upon these, the facts chiefly pertinent, we think the jury was amply justified in finding, as it did, that the execution of the note in question was procured by fraud and material misrepresentation on the part of the plaintiffs. On a demurrer to the evidence, and motion for directed verdict, the testimony of the defendants is to be taken in its most favorable light, and "they are entitled to the benefit of every reasonable

intendment upon the evidence and every reasonable inference to be drawn therefrom." *Christman v. Hilliard,* 167 N. C., p. 6.

For a statement as to the meaning and inclusive nature of the term "fraud," see *Oil Co. v. Hunt, ante,* 159.

The record presents no reversible error, and hence the judgment entered below must be upheld.

No error.

G. S. EMORY v. GAS STEAMER "CLINTON" ET ALS.

(Filed 20 February, 1924.)

Admiralty—Negligence—Fires—Evidence—Questions for Jury—Vessels—Federal Statutes.

Under the provisions of section 4282, U. S. Revised Statutes, exempting the owner of a vessel from liability for loss of or damage to goods being transported, caused by fire occurring on board the vessel, unless so caused by the design or neglect of the owner, evidence is sufficient to take the case to the jury which tends to show that the motor power of the vessel was an imperfect gas engine, and the navigation of the boat in a difficult route was left to an incompetent and illiterate boy, who was alone on the boat and without aid in preventing the spread of the fire which destroyed the plaintiff's merchandise thereon.

THIS is an appeal from a justice of the peace for recovery of $165.76, the alleged value of a shipment of merchandise on the gas-boat "Clinton" in transit from Washington, N. C., to Juniper Bay, in Hyde County. The plaintiff contended that the defendants were the owners of the gas-boat and were liable for the value of the goods which were destroyed when the boat was burned, and alleges that the burning of the boat was due to negligence on the part of the owners.

The defendants Hudson and Credle admitted in their answer that they were the owners of the gas-boat, but denied any negligence on their part, alleging that the goods were transported on a vessel registered in the United States Customs House; that the fire was not caused by any design or neglect on their part, and that they were protected from liability as owners of the vessel under the Federal statute. At the close of the plaintiff's evidence, motion of nonsuit was allowed, and plaintiff appealed.

S. S. Mann for plaintiff.

Walter L. Spencer and Small, MacLean & Rodman for defendants.

CLARK, C. J. This case was before the Court in *Emory v. Credle,* 185 N. C., 3. In that case the Court held that, under section 4282,

U. S. Revised Statutes, which exempts the owner of any vessel from liability for loss or damage to any merchandise in being transported on his vessel by means of any fire occurring on board the vessel "unless such fire is caused by design or neglect of such owner," it was error in the charge to permit the jury to consider the negligence of the crew as an alleged cause of the negligence, but it also said that in this case there was evidence "permitting the inference that the loss and destruction of the boat and goods were due to negligence on the part of the owners themselves."

On this second trial below it seems to us that the evidence admitted was restricted by the court to the negligence of the owner. The inquiry was confined to what occurred on the vessel at the time of the fire, and thereby necessarily narrowed the plaintiff's proofs to defects in the machinery or in the selection of incompetent master and employees by the owner.

It was in evidence that the captain and master of the boat was not on it at the time of the fire; that the vessel had a back-firing engine that had given trouble on the trip down from Washington when the captain was on board; that the witness Gorham, then only seventeen years of age, not only on this occasion when plaintiff's goods and the vessel were destroyed by fire, but on other occasions, had carried this vessel by himself, with valuable cargoes, through tortuous channels, beset, as appears from government charts, with shoals and narrows, across the open water of Pamlico Sound, he being ignorant of the names, depths or dimensions of the various bays, creeks, channels and shoals through which he was attempting alone to navigate a vessel of considerable dimensions and capacity; that he was without license, though acting as captain and mate, engineer and machinist—alone, coping with the difficulties of managing a refractory engine and guiding a vessel loaded with goods of plaintiff and others through intricate passages, without even a helmsman to assist him in running his vessel with the wind, to prevent or allay the spread of the flames, and finally having to abandon his charge and seek his own safety by committing himself to the waters, fortunately shallow enough to enable him to escape to a remote shore with his life. He could neither read figures nor tell anything about the depth or changes in channels from the charts; yet, as plaintiff's counsel quotes:

> "He was the cook and the captain bold,
> And the mate of the 'Nancy' brig;
> He was the bos'un tight and a midshipmite
> And the crew of the captain's gig."

That the boat was thus without any adequate supervision and left to the sole control of an uneducated and incompetent boy, was evidence

of negligence of the owner in not exercising proper supervision, from which the jury could have inferred the negligence of the owner.

A case exactly in point is *Matter of Wright* (1878), 10 Ben. (U. S.), 14, in which it was held as follows: "It is the duty of the owner to provide the vessel with a competent master and a competent crew, and to see that the ship when she sails is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances. And if by reason of any fault or neglect in these particulars a loss occurs, it is with his privity within the meaning of the act. If some secret defects exist which could not be discovered by the exercise of such due care, the owner is exonerated by the exercise of all proper care in making his ship seaworthy." 6 Fed. Stat. Ann. (2 ed.), p. 346.

We think, therefore, the case should have been submitted to the jury upon the evidence. The judgment of nonsuit is

Reversed.

FERTILIZER COMPANY v. W. A. BROCK ET AL.

(Filed 20 February, 1924.)

Judgments—Admissions—Conditions—Appeal and Error.

Where the defendant in an action upon a joint note admits his liability for one-half thereof, and contends he is not further liable under an agreement between himself and the payee, it is reversible error for the trial judge to enter judgment against him for one-half, and ignoring the conditions claimed by him, submit to the jury his liability for the other half.

APPEAL from *Bond, J.,* November Term, 1923, of PASQUOTANK, from an order of the clerk refusing to sign judgment tendered by the plaintiff.

On 1 May, 1922, the defendants signed the note sued on. The plaintiff brought suit against both of the makers. The defendant Mann filed no answer, but the defendant Brock filed an answer, admitting his liability for one-half the note, less a credit of $419 which he personally had paid, alleging that it was agreed at the time of the execution of the note that he was to be bound for only one-half, and that the payee had expressly agreed to release him from any and all liability over one-half.

Bond, J., signed the judgment in the record against the defendant Brock for one-half the note, less the credit which he had paid, and ordered that the question as to his liability upon the other half be submitted to a jury, without prejudice to the plaintiff.

The plaintiff contended that there was no issue raised by Brock's answer to be submitted to the jury except his liability on the second half, or Mann's half, of the note, and as to that he had expressly admitted his liability, and there were no facts to be found by the jury. In the Superior Court the defendant W. A. Brock was permitted to amend his answer to aver that said one-half was to be in full and complete satisfaction of plaintiff's claim against said Brock. The court entered judgment against said Brock for $2,243.74, with interest from date of judgment, being one-half of the full amount of the note, deducting the payment of $419, and ordered that the question of the liability of the defendant W. A. Brock upon the remainder of the note or bond sued upon should be submitted to a jury. From this judgment the defendant Brock appealed.

Aydlett & Simpson for plaintiff.
Ehringhaus & Hall for defendant W. A. Brock.

CLARK, C. J. The tender by defendant Brock of judgment, he contends, was conditioned upon its being taken by plaintiff in full satisfaction, so far as he was concerned, of the claim set out in the complaint.

The judgment of the court ignores such condition and gives judgment for the one-half (deducting payment of $419), and reserves for future trial and determination plaintiff's claim for the balance of the amount sued on.

A tender of judgment of an amount less than the amount sued on, in full satisfaction, is like a tender of cash for a less amount than is claimed by the plaintiff. A plaintiff cannot reap the benefit of such tender made by a defendant without accepting its burden as well. In such case the judgment must be set aside in its entirety unless it is admitted by the plaintiff to be in full of his demand in accordance with the tender. *Cline v. Rudisill,* 126 N. C., 523.

In *Stewart v. Bryan,* 121 N. C., 46, where the complaint sets up two causes of action—one for indebtedness due on a note, and the other for fraudulent conversion of money—it was held that a judgment entered by default was presumed to be on the note, as a judgment by default final could be entered thereon, but the cause could not be retained as to the charge of fraud, as to which there is no such presumption.

In 23 Cyc., 731, it is held that where the defendant in his pleadings admitted the plaintiff's cause of action against him to a specific limited amount, the latter will be entitled to take judgment on that amount, but the admission must be distinct and unequivocal and not conditional, and that where the defendant's answer admits the justice of a portion of plaintiff's demand, the plaintiff, while entitled to take judgment for

the amount so admitted to be due, could not proceed to trial upon the remainder of the claim at common law, but added that this has been permitted by statute in several States, which are there cited, especially Alabama, Louisiana, New York, Ohio, Pennsylvania, and Wisconsin.

It would seem that, upon the facts in this case, the rule laid down in the States above cited, allowing judgment for the amount admitted to be due, and reserving for jury trial that which is not admitted, might be the more logical and better course; but upon the authorities this was not allowed at common law, and as we have no statute making a change in this respect, the judgment rendered in this case must be set aside.

The plea of the defendant must be taken as intended to be conditional upon its acceptance in full of the plaintiff's entire demand, and, not having been so accepted, the entire case must stand to abide the decision of the jury.

New trial.

R. L. ANDERSON v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 20 February, 1924.)

1. Evidence—Demurrer.

The plaintiff's evidence must be accepted as true and in the light most favorable to him, upon defendant's motion as of nonsuit.

2. Carriers — Title — Presumptions — Evidence — Consignor and Consignee—Actions.

While the title to a shipment of goods upon carrier's open bill of lading is presumed to pass to the consignee, it may otherwise be shown; and where the shipment is refused by the consignee because of being rendered worthless through the carrier's negligence *in transitu*, or redelivered to the carrier by him, the title is revested in the consignor and he may maintain his action against the carrier for damages.

ADAMS, J., concurring; CLARKSON, J., concurring in the opinion of ADAMS, J.

APPEAL from *Bryson, J.*, at Fall Term, 1923, of CLAY.

The plaintiff, in Clay County, N. C., in February, 1922, killed and dressed a hog, weighing 595 pounds, and on the next day delivered it to the defendant express company to be shipped to Dr. Cutts, president of Willingham School, at Blue Ridge, Ga. The evidence is that the hog was loaded on a wagon on the evening of the 15th and allowed to remain out all night, the weather being very cold, and was started next morning about sunrise to Murphy, and delivered that morning to the defendant, who accepted the shipment. On its arrival at Blue Ridge,

Ga., it was delivered to the agent of the consignee and carried out to the consignee. It was then discovered that the meat was badly damaged.

Immediately on discovery of its unusable condition it was sent back by the consignee, who declined to accept it, because "badly spoiled and unusable," to the agent of the defendant at Blue Ridge, who, upon examination, said it was in bad condition, and told the servant of the consignee to "take it out and dump it"—that is, bury it—which was done.

The evidence is, that the weather of 15, 16, and 17 February was very cold; that the plaintiff used great care in dressing said hog, and selected this cold spell in which to kill it, and it was in good condition when delivered to the agent of the defendant at Murphy for shipment. The plaintiff alleges negligence, in that the hog was damaged in the transportation thereof, in that it was placed in a car, close to a heated stove, whereby it was damaged and spoiled before reaching its destination and the consignee.

At the close of all the evidence the defendant moved for a nonsuit, which was granted, and the plaintiff appealed.

Anderson & Gray and A. W. Horn for plaintiff.
J. D. Mallonee for defendant.

CLARK, C. J. This being a nonsuit, the evidence for the plaintiff must be taken as true and in the most favorable aspect for him. It is true, as a general principle, that when there is a shipment by a common carrier upon an open bill of lading it becomes the agent of the consignee, but, as said by *Hoke, J.*, in *Buggy Corp. v. R. R.*, 152 N. C., 122, "It may be shown that, owing to the carrier's default, the parties have rescinded the contract and restored the title to the consignor before the action brought, as in *R. R. v. Guano Co.*, 103 Ga., 590." That case held that "Where a consignee of freight refuses to receive goods on account of damage done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damage against the carrier. And other qualifying conditions might be suggested."

The above principle has been cited and approved in *Aydlett v. R. R.*, 172 N. C., 49, where, citing from the above case, and upon testimony almost identical with this, this Court said: "On account of bad condition of potatoes on arrival, the consignee refused to receive them and notified the consignor at once." Here the consignee refused to accept the shipment, and promptly notified the carrier. This Court held, in *Aydlett's case:* "As a general rule, it is true that where goods are shipped upon an open bill of lading, the title passes to the consignee at the time they are delivered to carrier, and any ensuing damages must

be recovered by consignee, etc. Notwithstanding this general rule, it is open to the consignor to show that the goods were shipped on consignment, or that, owing to peculiar circumstances, by agreement between himself and the consignee, the title had revested in the consignor while the goods were *in transitu,* and that the consignor had a pecuniary interest in the proper performance of the contract of shipment. The identical case is presented in *R. R. v. Guano Co.,* 103 Ga., 590, where it is held that where a consignee of freight refuses to receive goods on account of damage done to them in the hands of the common carrier, and the goods are subsequently *thrown back* on the hands of the consignor, the latter has a right to bring action for such a damage against carrier. This case is cited with approval by this Court in *Buggy Corp. v. R. R.,* 152 N. C., 122." Nothing is said here about an agreement to rescind.

Upon this nonsuit the testimony for the plaintiff must be taken as true that this shipment was in good condition when delivered to the express company and badly spoiled when it arrived at its destination, and the defendant put on no evidence to contradict either statement. Dr. Cutts testifies that he did not pay for it because it was spoiled and unusable. The defendant's witness, its agent at Blue Ridge, testified that it was badly spoiled when it was delivered there.

It is very certain that the consignee could not sue for the damage, for he refused to accept the goods because it was spoiled; and if the consignor cannot sue, it would follow that the defendant would be liable to no one for negligence in the transportation of the shipment. The refusal of the consignee to accept the shipment because spoiled, and of the consignor in bringing this action, are the equivalent of an express agreement to rescind, and, indeed, a rescission in itself.

We think, therefore, that the case should have been submitted to the jury as to whether the shipment was damaged by the negligence of the defendant, and that the plaintiff is entitled to maintain this action upon the evidence set out.

New trial.

ADAMS, J., concurring: When goods are delivered to a common carrier for transportation on an open bill of lading, the presumption is that the title to the goods passes to the consignee. In such case, if there is no restrictive condition, he, and not the consignor, is the aggrieved party, in whose name a suit for loss or damage must be brought. *Ober v. Smith,* 78 N. C., 313; *Gwyn v. R. R.,* 85 N. C., 430; *Stone v. R. R.,* 144 N. C., 220; *Mfg. Co. v. R. R.,* 149 N. C., 261; *Buggy Corporation v. R. R.,* 152 N. C., 119; *Ellington v. R. R.,* 170 N. C., 36. But it is open to the consignor to show his right to institute and main-

tain the action. He may sue if title is retained, or if the goods are to be sold for his benefit, or if he has contracted to deliver the goods to the consignee, or if title is to pass only when the goods are received, or if the consignee is to inspect the goods before the purchase price is payable, or if a draft attached to a bill of lading is not paid by the consignee, or if the goods are rejected and thrown back on the consignor. *Summers v. R. R.,* 138 N. C., 295; *Rollins v. R. R.,* 146 N. C., 153; *Cardwell v. R. R., ibid.,* 219; *Davis v. R. R.,* 147 N. C., 68; *Robertson v. R. R.,* 148 N. C., 323; *Box Factory v. R. R., ibid.,* 421; *Mfg. Co. v. R. R., supra; Elliott v. R. R.,* 155 N. C., 236; *Aydlett v. R. R.,* 172 N. C., 47; *Trading Co. v. R. R.,* 178 N. C., 175; *Collins v. R. R., ante,* 141.

There was at least some evidence from which the jury might have inferred that the hog was rejected by the consignee and in contemplation of law thrown back on the hands of the consignor. *R. R. v. Guano Co.,* 103 Ga., 590; *R. R. v. Electric Co.,* 55 Ky., 918; *Buggy Corporation v. R. R., supra; Aydlett v. R. R., supra.*

But there is another reason for sustaining the action. Whether the plaintiff be the consignor or the consignee there can be only one recovery on the alleged cause of action, and the defendant, if protected against paying for the property more than once, should have no special concern as to any diversity of interest between the possible claimants. *Stone v. R. R., supra; Rollins v. R. R., supra.* The consignee not only refused to pay for the hog because it was spoiled, but he testified at the trial on behalf of the consignor. He has interposed no objection to the plaintiff's recovery, and has apparently disclaimed any personal interest in the shipment. In these circumstances he will be deemed to have assented to consignor's right to maintain the action. At any rate, he does not claim to be the party aggrieved. The apposite principle is thus stated: "It has been held that, in a suit by the consignor against the carrier to recover the loss caused by damage to the goods shipped, where no exception has been filed *in limine* to the right of such consignor to sue, and where the consignee appears and testifies for plaintiff on the merits, the defense by the carrier that the consignor, not being the owner of the goods, has no cause of action, cannot avail it, since the only object of the carrier in seeking to have the proper plaintiff is to avoid double payment for the damage claimed; and the action of the consignee in testifying for plaintiff consignor is tantamount to an acquiescence by the consignee, and he is thereby estopped from recovering on the same cause of action." 10 C. J., 348.

CLARKSON, J., concurs in this opinion.

MARY STRUNKS, ADMINISTRATRIX OF JOHN M. STRUNKS, *v.* SOUTHERN RAILWAY AND JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS.

(Filed 20 February, 1924.)

1. New Trials—Partial New Trials—Issues—Appeal and Error.

Where damages are sought in an action against a carrier for a personal injury involving the issues of negligence and assumption of risks, and the Supreme Court, on appeal, has granted a new trial only on the issues of damages, these issues are properly refused by the judge upon the retrial of the case, the remedy being by a petition to rehear in the Supreme Court under its Rules of Practice.

2. Same — Damages — Evidence — Carriers — Railroads — Federal Employers' Liability Act.

Under the Federal Employers' Liability Act, contributory negligence is considered in diminution of the employee's damages for personal injury alleged to have been caused by the defendant's negligence; and upon a new trial awarded by the Supreme Court upon the issues of damages alone, it is reversible error for the trial judge to exclude evidence of this character under the defendant's objection, when confined to this phase of the controversy, the amount of the damages being for the jury to determine upon conflicting evidence.

APPEAL by defendants from *Harding, J.*, at April Term, 1923, of GUILFORD.

S. B. Adams and R. C. Strudwick for plaintiff.
Wilson & Frazier for defendants.

ADAMS, J. This case was before the Court at the Fall Term of 1922. 184 N. C., 582. At the first trial in the Superior Court the issues addressed to negligence, assumption of risk, and damages were answered in favor of the plaintiff, the recovery being apportioned to the widow and the three surviving children. *Gulf, etc. R. R. Co. v. McGinnis,* 228 U. S., 173, 176; 57 Law. Ed., 785, 787; *Central Vermont R. R. Co. v. White,* 238 U. S., 507; 59 Law. Ed., 1443; *Horton v. R. R.,* 175 N. C., 472, 488; *Moore v. R. R.,* 179 N. C., 637. On appeal, a new trial was awarded as to the four issues relating to damages but not as to the others. The case was tried the second time in the Superior Court at the April Term of 1923, and the issues as to damages were again answered in favor of the plaintiff, the apportionment being made in the same manner but not in the same amount as at the former trial. Upon the verdict, judgment was rendered for the plaintiff, and the defendants appealed.

The first assignment of error called in question his Honor's refusal to submit to the jury upon the second trial issues directed to the defend-

ant's negligence and the intestate's assumption of risk (assignments 1 and 2). These issues were considered and answered by the jury upon the first trial, and as to them, a new trial was denied on appeal. The defendants have evidently overlooked the fact that the new trial was to be restricted to the question of damages, and have disregarded the preliminary requisites of a petition to rehear. Rules of Practice in the Supreme Court, 185 N. C., 803. The first and second assignments of error are therefore without merit and must be overruled. The third assignment is more serious.

The plaintiff examined L. W. Carr, who had testified on the former trial, and upon the cross-examination of this witness the defendants offered to prove the facts to which he had previously testified; but upon the plaintiff's objection this evidence was excluded. The witness would have answered as appears in his testimony on pages 13-22 of the printed record of the first trial. The ground of exclusion was this: "It (the proposed testimony) appeared upon the issue of negligence, and the court, having declined to submit the issue of negligence, held that the evidence was immaterial." The same ruling was made with respect to the testimony of M. M. Smith.

His Honor was correct in refusing to admit the proposed evidence on the issue of negligence; but the several issues as to damages were yet to be tried, and evidence tending to show contributory negligence was competent in diminution of damages. U. S. Compiled Statutes, sec. 8659; *N. and W. Ry. Co. v. Earnest,* 229 U. S., 114; 57 Law. Ed., 1096; *Ill. Cen. Railroad Co. v. Skaggs,* 240 U. S., 66; 60 Law. Ed., 529; *Horton v. R. R., supra.*

At the first trial the jury were instructed that the damages should be diminished in proportion to the negligence attributable to the plaintiff's intestate, and upon the second hearing the defendants offered evidence which they say would have entitled them to a similar instruction. If, then, the excluded evidence would reasonably have tended to establish contributory negligence it should have been admitted. After bestowing upon the record a careful examination we have concluded that the rejected evidence includes circumstances which the jury should have been permitted to consider on the question whether the deceased exercised due care for his personal safety. If believed, this evidence tended to show that the intestate on the occasion of his injury made use of a brake stick by putting it into the brake wheel for the purpose of applying additional pressure; that there was a rule of the railroad company prohibiting the use of such a stick by brakemen; that the deceased provided his own stick, and that it was not furnished by the company; that the brakes could be applied without the use of a stick, and that the stick used by intestate was obviously defective. The de-

fendants specifically pleaded contributory negligence; and although they denied that the stick was defective, they further alleged that if it was, its defect was known to the deceased, and that his negligent use of the stick was the proximate cause of his injury. To be sure there was evidence to the contrary, but the conflict of testimony called for the intervention of the jury. *White v. White,* 15 N. C., 257; *Mitchell v. R. R.,* 124 N. C., 236; *Powell v. R. R.,* 125 N. C., 371.

On the former appeal the Court said: "There must be another trial, but only on the issue as to damages." If by his own negligence the plaintiff's intestate contributed to his injury and death, what damages may be recovered? If the causal negligence is partly attributable to him and partly to the defendant, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both. *N. & W. R. R. v. Earnest,* 229 U. S., 114; 57 L. Ed., 1096. In order to determine the relation which the negligence attributable to the defendant bears to the entire negligence attributable to both (if the intestate was negligent), evidence of the defendant's negligence and of the intestate's contributory negligence may be introduced and considered, although the *issue* of negligence was determined against the defendant on the former trial and need not again be formally answered. Such evidence may be necessary to determine the *quantum* of damages. We suggest, however, that a formal issue as to contributory negligence may tend to simplify the situation.

The defendant is entitled to a new trial on the issue of damages.

New trial.

IN RE R. E. LITTLE'S WILL.

(Filed 20 February, 1924.)

1. Wills—Caveat—Issues—Procedure—Statutes.

Where a caveat to a will is duly filed, with the required bond, etc., at the same time the paper-writing is offered for probate, it is required of the clerk to transfer the proceedings to the civil-issue docket for the trial of the issue of *devisavit vel non,* and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. C. S., 4158, 4159, 4161, 24.

2. Same—Collector.

Where a caveat to a will is duly filed and further proceedings stayed, it is discretionary with the clerk to appoint as collector for the preservation of the estate the one named in the paper-writing as executor, or some other to act as collector for that purpose. C. S., 24.

3. Same—Limitation of Actions.

The effect of the amendment of 1907 was to limit the time in which a caveat to a will may be filed, and does not affect the time within that period when the same may be done, or the further proceedings under the statute applicable. C. S., 4158.

APPLICATION for probate of will in common form, heard on appeal from the clerk of Superior Court of ANSON County on 8 August, 1923, before his Honor *Stack, J.*, of the Thirteenth Judicial District.

From a perusal of the record it appears that on 3 August, 1923, propounder offered for probate a paper-writing purporting to be the last will and testament of R. E. Little, deceased, duly witnessed, and designating, by codicil thereto, the Bank of Wadesboro, N. C., as executor; and also offered prepared proof by the said witnesses of the due execution of the will and codicil thereto. At that very moment a caveat was presented and bond tendered, by persons duly interested, challenging the validity of said alleged will, moved the clerk to hold up all further proceedings except the appointment of collector to collect and preserve the estate. The executor named moved that before transferring the cause to the civil issue docket for trial on an issue of *devisavit vel non*, the clerk proceed to admit the will to probate in common form. The motion was denied by the clerk, and on appeal the court affirmed the judgment of the clerk; directed that said clerk transfer cause to civil issue docket for trial, and in meantime issue letters collection to some discreet person for the collection and preservation of the property of deceased. Propounder thereupon excepted and appealed to this Court.

McLendon & Covington and Caudle & Pruette attorneys for propounder.

E. T. Cansler, Jno. C. Sikes, and Parker, Stewart, McRae and Bobbitt attorneys for caveators.

HOKE, J. The legislation more directly pertinent to the question presented appears in sections 4158, 4159, 4161 and section 24 *et seq.*, in chapter 1 of the Consolidated Statutes. In section 4158 it is enacted, in part, "That at the time of the application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the Superior Court and enter a caveat to the probate of such will," etc. Section 4159 provides in effect that upon the caveator giving bond or making deposit to secure costs, etc., or on being allowed on affidavits to proceed without bond, etc., the clerk shall transfer the cause to the

civil issue docket for trial, and citation shall issue to parties interested, etc. Section 4161 is to the effect that where a caveat is entered and bond given, the clerk shall forthwith issue an order to the personal representative having the estate in charge to suspend all further proceedings in relation to the estate, except the preservation of the property and collection of debts. Section 24 and following sections provide for appointment of some discreet person under letters of collection, authorizing him to preserve the estate, etc., whenever a delay is necessarily produced in the admitting the will to probate, granting letters of administration or letters with the will annexed, etc.

From a proper consideration of these and other apposite sections of the law it is, in our opinion, clearly contemplated that a caveat to the probate of the will may be entered at the time of the application, the time of the probate, or at any other time thereafter within seven years, with certain additional provisions in favor of persons under disability, and that on such caveat entered and bond filed, etc., the cause is transferred to the civil issue docket for trial, and any and all other proceedings cease except those looking to the preservation of the estate, etc., the collection of debts, etc. That if said caveat is entered after probate and letters issued, such letters are not thereby necessarily recalled. But the representative already qualified will continue in charge and do what is necessarily required to preserve the estate unless, on motion made and proof offered, these letters should be recalled, when this course is required for the proper protection of the estate. And if the caveat is entered and bond given before probate of will, the question is transferred to the civil issue docket of Superior Court, and a collector is appointed as was done in this instance. There is no reason, as suggested in the judgment of the Superior Court, why the executor designated in the will should not be appointed collector, but the matter is referred to the sound discretion of the clerk and with a view to the best interest of the estate. This section 4158, as it now appears in Consolidated Statutes, expresses the law as affected by the amendment of 1907, chapter 862; prior to that time the provisions were as follows: "At the time of the application of the probate of any will, or at any other time thereafter as provided by law, any person interested, etc., may in person or by attorney enter a caveat." Rev., 3135; Code, ch. 83, sec. 2158. And in construing the law as it formerly stood, decided intimation is given that on caveat properly entered before probate all further proceedings should cease until the issue was determined except the ordinary steps required for the preservation of the estate. *In re Palmer's Will*, 117 N. C., 134. And under legislation substantially similar, it has been directly held that where a caveat is entered before probate, no probate should be had until the question is determined. *Jones v. Mose-*

ley, 40 Miss., 261; 28 R. C. L., 395. In the last citation it is said: "When objections are filed as soon as the paper is propounded, the will should not be probated until disposition of the objections has been made.". Prior to the amendment of 1907 there had been no statute of limitation to the entrance of a caveat, and a consideration of the amendment, both in the original and as now expressed in the Consolidated Statutes, will show, we think, that its sole purpose was to provide for a statute of limitations and to fix the definite time from which the statutes should run, and there was no purpose to otherwise modify the original statute as to the time when a caveat may be offered, or the effect of it when properly plead and bond given; or, as stated, the caveator has been allowed to proceed without bond. A delay having been thus caused in the probate of the will and issuing of letters of administration, we think his Honor and the clerk have correctly ruled that letters of collection be issued for the care and preservation of the estate under section 24 of Consolidated Statutes as above set out.

The judgment and orders thus far made in the cause are approved. Affirmed.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. S. S. BISSETT.

(Filed 20 February, 1924.)

Contracts—Co-operative Marketing—Landlord and Tenant—Statutes—Liens—Possession—Trusts—Nonmember Tenant—Penalties.

The landlord and tenant act (C. S., 2355) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Coöperative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant.

APPEAL by plaintiff from *Connor, J.,* at chambers in Nashville, on 20 September, 1923, dissolving the restraining order.

Burgess & Joyner and Austin & Davenport for plaintiff.

Aaron Sapiro, Elystus L. Hayes, Theodore E. Bowen, and L. L. Levy of counsel for plaintiff.

Connor & Hill for defendant.

CLARK, C. J. This was an action by the plaintiff association, a nonprofit coöperative marketing association organized under chapter 7, Laws 1921. The defendant is a member of the association. By the

terms of the marketing agreement embodied in the association agreement, signed by the defendant, he agreed to sell and deliver to the association all of his tobacco during the term of his contract. The pertinent features of the contract so far as this appeal is concerned are as follows:

"2. The association agrees to buy and the grower agrees to sell and deliver to the association all of the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1921, 1922, 1923, 1924, 1925."

"3. The grower expressly warrants that he has not heretofore contracted to sell, market, or deliver any of his said tobacco to any person, firm or corporation, except as noted at the end of this agreement. Any tobacco covered by such existing contracts or crop mortgage shall be excluded from the terms hereof for the period and to the extent noted."

"11. The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion; but if he produce any tobacco, or acquires or owns any interest in any tobacco, as landlord or lessor, during the term hereof, it shall all be included under the terms of this agreement, and must be sold only to the association."

"12. Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver all the tobacco produced by or for him."

"13. (*a*) This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control of any commercial tobacco or any interest therein as a producer or landlord during their term of this contract."

"18. (*a*) The grower hereby agrees to pay to the association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types and grades of tobacco for the breach of this contract."

The complaint alleges that the defendant had violated his agreement by selling all of his 1922 crop of tobacco to persons other than to plaintiff, and had announced that he would not deliver any of his tobacco of the 1923 crop to the association, and that the defendant had sold 1,500 pounds of his 1923 crop to persons other than the plaintiff, and prayed that he be required to perform the association agreement, and that he be restrained from delivering, selling or otherwise disposing of any tobacco produced by or for him or controlled by him during the life of the contract to any person or persons other than the plaintiff, and asked for an injunction *pendente lite*.

An order was issued by the trial judge that the defendant appear and show cause why a restraining order should not be issued to the

hearing, and a temporary restraining order was served upon the defendant from disposing of any of his tobacco pending the hearing of the order to show cause.

Upon the sworn statement of the defendant that he had sold no tobacco of the 1923 crop to persons other than plaintiff, and in view of his sworn statement that he intended to deliver all of his tobacco to it, the plaintiff consented to a dissolving of the restraining order theretofore issued, and did not seek a preliminary injunction. The court then granted an injunction to the defendant against the plaintiff, as prayed, that it be restrained from withholding from the defendant, and from any advancement to be made to the defendant, any sum of money on account of the sales by his tenants, who were not members of the association, of their share of the tobacco.

The Tobacco Growers Coöperative Association Act, chapter 87, Laws 1921, was construed and its validity sustained in *Coöperative Association v. Jones,* 185 N. C., 265. The only point which arises on this appeal is the construction of the clauses of the contract above set out, especially of clause 11, upon the following facts:

Philip Bissett, who was not a member of the association, rented lands from the defendant in 1923 and planted four acres in tobacco, as did also Carey Finch, who rented four acres from him, and William O'Neal, who rented three acres. All of the defendant's tenants above enumerated pay as rent one-half of the crops produced by them. It is admitted that of the tobacco produced by said Bissett, Finch and O'Neal, the one-half has been turned over to the defendant as rent, and has been or will be delivered by him to the plaintiff association, and all the tobacco produced by him upon lands which he cultivated in 1923 has been or will be delivered to the association.

It is also admitted that of the tobacco produced by the tenants, Philip Bissett, Finch and O'Neal, the one-half belonging to them will be by them marketed as they see fit, and as they are not members of the association, it is presumed that they sold their tobacco on what is known as the "open" or "auction" market; and it is admitted that as the above tenants of the defendant have prepared their tobacco for market the defendant had met with them and the tobacco was divided, the defendant taking his one-half and the above tenants taking their one-half.

The question presented on appeal is simply this, as is admitted by the plaintiff and the defendant: Can the plaintiff association, from the advancements which it has agreed to make to its various members, upon the delivery of tobacco to it, deduct five cents per pound as liquidated damages for each and every pound of tobacco produced upon the lands of the member by tenants who are not members of the association, and

who called for an actual division with the landlord, and who declined to have their part of the tobacco delivered to the plaintiff association?

The plaintiff's brief admits that it cannot compel the delivery by the landlord or by the nonmember tenant to it of the portion of the crop produced by the nonmember tenant, which is the property of the tenant and not of the landlord.

Under paragraph 2 of the contract the defendant agreed "to deliver to the association all of the tobacco produced by or for him or acquired by him as landlord or lessor." Paragraph 11 of the contract provides: "If he (the member) produce any tobacco or acquire or own any interest in tobacco as landlord or lessor during the term hereof, it shall be included under the terms of this agreement, and must be sold only to the association."

It would seem clear, therefore, that the only tobacco covered by this contract is tobacco of the member produced on lands either owned or rented by him. Neither the plaintiff nor the defendant agreed that the defendant would be compelled to either deliver tobacco belonging to a nonmember tenant nor to pay five cents a pound penalty for failure to do so.

It is significant that, though the act on its face has been carefully and skillfully drawn, it is nowhere stated in it that the landlord shall be compelled to deliver all tobacco produced upon his lands by nonmember tenants. Such provision was made in the Kentucky statute and is the basis upon which was decided the case in the Circuit Court of McCracken County of *Tobacco Growers Coöperative Association v. Feagain,* decided 19 January, 1924, and which is cited by plaintiff.

The landlord and tenant act, C. S., 2355, does not make the landlord of a cropper the owner nor give him title to the tenant's share of the crop. It merely provides that the landlord is "vested in possession of all the crops raised on the land until the rents for said land are paid"; and in the last sentence of that section it is said: "This lien shall be preferred to all other liens." The landlord therefore has a preferred lien on the crop and, so to speak, is a trustee in possession until the advances, if any, are paid, but he is not owner and has acquired no title to the tenant's share who can therefore, with the permission of the landlord, move or sell his share of the crop or can pay off the lien. The tenant's share of the tobacco in this case has not been "delivered, consigned to or marketed" by the landlord, and the landlord has not acquired and does not own any interest in the tenant's share, but merely has a right of possession until his lien has been paid off.

The plaintiff frankly admits in his brief that the tenant has a prior right to the association in his share of the crop, and can insist upon a division and sell the tobacco to any one he chooses, but he claims that

the defendant has breached his contract and is liable to the penalty of five cents per pound when he does not compel the tenant to deliver his half of the crop to the plaintiff.

It may well be, under section 11 of the contract, that if the landlord takes over any part of the tenant's share in the crop and applies it under his statutory lien for advances, he can be justly said to acquire or own such interest in the tobacco as lessor, and it will be included within the terms of the agreement, and if not sold by the landlord only to the association, he is liable to the penalty of five cents.

But that is not the state of facts here under which it is agreed that the tenant demanded and received his one-half share of the tobacco. It may be that the tenant owed no advances to the landlord or that he was able to pay them off in cash.

Therefore, as under the agreement it appears that the tenant received his half of the tobacco, the landlord has not, under the terms of section 11 of the contract, acquired nor owns any interest in the tenants' half, and he is not liable to the penalty of five cents per pound to the plaintiff for the nondelivery of the same to the plaintiff.

Judgment of the court below is

Affirmed.

NORTH CAROLINA RAILROAD COMPANY v. C. D. STORY, SHERIFF OF ALAMANCE COUNTY, AND P. M. KING, ADMR. OF MAGGIE BARBER, DECEASED.

(Filed 20 February, 1924.)

1. **Railroads—Carriers—Leases—Lessor and Lessee—Torts—Damages.**

The North Carolina Railroad, as lessor of its railroad and equipment to the Southern Railway Company, is liable during the continuance of the lease for the torts and wrongs of the latter company, its agents and employees, committed in the use and operation of the railroad within the exercise of its franchise.

2. **Same—Government—Courts — Jurisdiction — State Courts — Federal Questions—Judgments—Execution—Appeal and Error.**

Where judgment has been entered against the lessor of a carrier under government control in the State courts and affirmed by the State Supreme Court on appeal, and in another action brought thereon the judgment is upheld on a second appeal, and in both the carrier has set up all its defenses under the Federal Transportation Act of 1920, inclusive of denying to the plaintiff therein the right to issue execution against the property of the carrier, the judgment in the State court, not properly questioned by an appeal or writ of error upon the Federal defenses thus presented, is conclusive upon the lessor carrier, and valid; and the carrier's suit in the State court to enjoin its enforcement by execution against the lessor's property cannot be maintained.

3. Same.

Where the defendant in an action sets up Federal questions as a valid defense to his liability in the State court, the decisions of the United States Supreme Court are controlling on the subject; but where this right has been erroneously denied by final judgment in the State court, it is conclusive on the carrier until it is reversed or modified by appeal or other writ in the orderly review of the case.

4. Same.

Under the facts of this case, *Held*, the position of the carrier seeking injunctive relief against execution under the final judgments rendered against it in the State court that the judgments were upon such grounds as to exclude its taking the case by proper proceedings to the United States Supreme Court upon the Federal questions involved, is untenable.

5. Appeal and Error—Judgments—Defenses—Rehearings.

Where a carrier does not take the proper steps to have a final judgment rendered against it in the State court reviewed in the United States court upon a defense set up in denial of its rights under the Federal law, and seeks to enjoin the enforcement of the judgment by execution in the State courts, it is, in effect, an endeavor to obtain a rehearing of the case by means of a second suit, which is not permissible.

CIVIL ACTION heard on return to preliminary restraining order before his HONOR, *Shaw, J.*, on 22 May, 1923, from ALAMANCE.

The action is for a permanent injunction restraining defendants from collecting or attempting to collect by execution and levy a certain judgment obtained by P. M. King, administrator of Maggie Barber, deceased, against the North Carolina Railroad Company, hereafter called plaintiff. On the facts presented, the application for further continuance of the restraining order was denied. The court below, however, in the exercise of a discretion vested in it by a recent statute, chapter 58, Laws of 1921, adjudged that the preliminary order be continued pending the appeal to this Court. From so much of the judgment as refuses to continue the restraining order to the hearing, and also make the same permanent, plaintiff excepts and appeals, etc.

Wilson & Frazier and Manly, Hendren & Womble for plaintiff.
W. P. Bynum and R. C. Strudwick for defendants.

HOKE, J. As we understand, there is no substantial difference between the parties as to the facts affecting their rights, and from these facts contained in the present record, and by proper reference in the case of *King v. R. R.*, reported in 184 N. C., 442, it appears that plaintiff is lessor of the Southern Railway Company, under a lease for 99 years, which is still existent, and, under the terms of said lease and our State decisions applicable, is liable for the torts and wrongs of the

Southern Railway Company, its agents and employees, committed in the use and operation of plaintiff road, and in the exercise of its franchise. *Mabry v. R. R.*, 139 N. C., 388, citing *Aycock v. R. R.*, 89 N. C., 321, and *Logan v. R. R.*, 116 N. C., 940, and other cases.

That in February, 1920, P. M. King, administrator of Maggie Barber, deceased, sued the plaintiff railroad, alleging that his intestate had been negligently run over and killed by the agents and employees of the Southern Railroad, "operating plaintiff's railroad under the Director General of the United States, etc., pursuant to the acts of Congress," etc.

The plaintiff answered, denying liability and alleging that plaintiff's road at the time was under the control of the Director General of the United States under the acts of Congress and executive orders appertaining to the subject, and denied that the intestate was killed or injured by the negligence of its lessee or any of its agents or employees, etc.

On issues submitted, the administrator recovered judgment for $2,500 for the negligent and wrongful killing of the intestate by the lessee, and plaintiff excepted and prayed an appeal; but failing to prosecute the same, the judgment for said amount stands unchallenged and unquestioned by any writ of error or other process looking to a modification or review of the same.

That said judgment not being paid, the administrator instituted an action thereon, alleged the existence of the judgment, its nonpayment, etc.; and thereupon plaintiff answered, admitting the recovery of said judgment, but denied any and all liability thereon, setting forth its defense in effect as follows:

"To this complaint defendant answered, admitting the recovery and existence of the judgment sued on, but alleged that same was not a valid or binding judgment because it was obtained for the wrongful death of intestate caused by the negligence of the employees and agents of the Government of the United States while the properties of defendant were being operated and controlled by the Director General of Railroads under and by virtue of the acts of Congress and the orders of the President of the United States, and for that reason said judgment is illegal and void. Defendant alleged further, in effect, that this alleged negligent killing took place when its road and all equipment, etc., was in control and charge of the Government under the acts of Congress and orders aforesaid, and at a time when none of the agents and employees, etc., of defendant or its lessees were engaged in operating said road or in any way responsible for said death; and to hold it liable for such an injury under such circumstances would be to take defendant's property without due process of law, etc. And in supplemental answer, filed by leave of court, alleged further that the present action on the judgment in behalf of defendant was in the endeavor to

evade in some way the provision contained in the act of Congress known as the Transportation Act of 1920, sec. 206 (g), in terms as follows:

"'No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control.'

"And defendant pleads further provisions of said Transportation Act in bar of recovery on the judgment."

And the administrator having demurred, there was judgment sustaining the demurrer in terms as follows: "This cause coming on to be heard upon plaintiff's demurrer to the answer of defendant, it is now considered and adjudged by the court that said demurrer be and the same is hereby sustained. It is further considered and adjudged by the court that the plaintiff have and recover of defendant $2,500, with interest thereon from 21 March, 1921, and the further sum of $95.65, with interest from same date, and the cost of this action, to be taxed."

From this judgment plaintiff excepted and appealed to this Court, where the judgment sustaining the demurrer was affirmed. See case of *King v. R. R.,* 184 N. C., 442. And the opinion having been certified down, there was further judgment as follows:

"In this action, it appearing to the court that judgment was recovered by plaintiff against defendant at April Term, 1922, of this court, in the sum of $2,595.65, with interest and costs; that defendant appealed from said judgment to the Supreme Court, and that on said appeal the said judgment was affirmed, and that the certificate of the determination of said appeal has been received, and is now on file.

"It is now considered and adjudged by the court that execution of said judgment do proceed."

And these judgments stand unquestioned by writ of error or other process looking to their review or modification, and under and by virtue of the same the execution has been issued and levy made which plaintiff now seeks to enjoin.

Upon these, the facts chiefly pertinent, we must approve his Honor's ruling in denial of the injunction, and are of opinion that the plaintiff is concluded by the judgments against it as to the protection and immunity it now endeavors to invoke. In the original action against the plaintiff, the fact that the road had been taken over by the Government under the acts of Congress and executive orders appertaining to the subject was directly presented, and the question of liability was decided against plaintiff. This was under the position then prevailing here and in some of the other State courts under these acts of Congress

and executive orders; by correct interpretation the companies, in this instance plaintiff's lessee, were in charge of and operating the roads under the supervision and control of the Director General, and in proper instances both could be held liable. True, the position was later disapproved by the Supreme Court of the United States, the final authority on these questions, in *Miss. Pacific R. R. v. Ault,* 256 U. S., 554, and other cases, but this only serves to show that the judgment in question was erroneous, and binds the parties unless and until it is reversed or modified by appeal or other writ in the orderly review of the case. See the decisions cited in the case of *King v. R. R.,* 184 N. C., 442, among others, *Grignons, Lessee, v. Astor et al.,* 2 Howard U. S., 319, 340.

In this last case the Court, among other things said: "The purchaser is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error, and so where an appeal is given but not taken in the time allowed by law."

And in the second action, wherein judgment was rendered on the suit in the first, the plaintiff set up in his defense both the statutes and executive orders by which the roads were taken over by the Government, and also the Transportation Act of 1920, being chapter 91, 41st U. S. Statutes at Large; and this attempted defense having been held insufficient and disallowed, judgment was rendered against plaintiff; and, as heretofore stated, stands thus far unquestioned by appeal, writ of error, or otherwise.

The appellant does not contend that the defenses he is now attempting to make were not presented, discussed and determined against it in these former suits, and that judgments were therein entered establishing his liability, but it is insisted that the proceedings and judgments have not been such as to enable it to obtain a review of the Federal question presented, for the reason that in the opinion in the last suit there are grounds advanced sufficient to uphold the judgment which do not involve the Federal question relied upon, and therefore no right of review having been afforded, a remedy is still open to him under and by virtue of the provisions of the Transportation Act, 41 Statutes at Large, ch. 41, sec. 216 (g), forbidding the levy of an execution on the property of the carrier where the cause of action in which it was obtained grew out of the operation of the road, etc., while in possession and control of the Government. The general principle, as stated, is undoubted and has been expressed and approved as late as April, 1923,

in the case of *The People ex rel. Doyle v. Atwell,* 261 U. S., p. 590, but in our opinion the position will not avail the appellant.

Recurring again to the facts presented in the first action by the administrator, plaintiff having pleaded the acts of Congress and executive orders taking over the roads by the Government in bar of relief, the defenses were disallowed and verdict and judgment were had establishing liability, notwithstanding these alleged defenses. This judgment, it will be noted, having been entered more than twelve months after the Transportation Act went into effect.

In a second suit on this judgment, as heretofore stated, the statutes and executive orders taking over the roads by the Government, and the Transportation Act by which they were restored to the owners, were all set up by plaintiff in its defense, and, for reasons stated in the opinion of the State Court (184 N. C., p. 442), these defenses were disallowed and final judgment entered establishing liability.

True, in the opinion, the Court, referring to the language of the Transportation Act more directly applicable (section 2069), said: "It might suffice to say, in answer to this position, that plaintiff thus far has not undertaken to levy any process or execution against the property of defendant road, and his proceeding does not therefore come within the literal terms of the provision on which he here relies." But the Court, putting aside this view, deals directly with the defenses presented, holding that they were not available to plaintiff, and that the former judgment in favor of the administrator established an enforceable liability.

From the force and effect of these two judgments, unchallenged and unquestioned by writ of error or other process looking to their modification, we are of opinion, as stated, that plaintiff is concluded on the question of liability, and that its application for an injunction against final process has been properly refused. So far from appellee's endeavoring to evade the effect of the Federal regulations on this subject, as suggested in appellant's brief, it would seem that appellant, having lost his right to review the judgments had against it, is endeavoring to obtain a rehearing of the case by means of a second suit—a course that is uniformly condemned under our decisions applicable. *Hospital v. R. R.,* 157 N. C., p. 460, and cases cited.

Speaking to the two inhibitions appearing in the Federal legislation and executive orders protecting the roads while in the control of the Government, the Court, in *King v. R. R.,* among other things, said: "The first inhibition, as stated, being to protect the roads from physical interference by third persons, creditors, or other, while in possession and control of the Government, and the second to protect the carriers in the possession and control of their own roads from physical

interference by reason of any actions or judgments provided for and allowed by the government, but this legislation, in our view, was never intended to protect the carriers from judgments in independent suits by claimants where they have failed to plead or properly insist on the immunity from liability which had been provided for their protection. The Government has made provision by its legislation to protect the carriers from molestation by reason of any judgments it has authorized and provided for, but it has not undertaken, as guardian *ad litem,* to avoid or destroy the force and effect of independent judgments against which the carrier has neglected or failed to interpose his proper defenses."

We find no error in the judgment appealed from, and the same is Affirmed.

GLOBE INDEMNITY COMPANY v. SYLVA TANNING COMPANY, CAROLINA DRAY COMPANY, AND GEORGE V. WHITTON.

(Filed 20 February, 1924.)

1. Appeal and Error—Objections and Exceptions — Presumptions — Verdict—Judgments—Trials.

Where appellant has not excepted upon the trial to the court's ruling upon the evidence or to the issues submitted, or to the instructions given, but only to the judgment signed in accordance with the verdict, the Supreme Court on appeal will presume that the trial was free from error and only consider the correctness of the judgment in its relation to the verdict rendered.

2. Principal and Surety—Contracts—Fraud—Deceit — Suits — Cancellation—Equity.

Where a surety on a bond given by it and its principal for the faithful performance of a contract with another, brings suit to set aside the instrument for fraud or deceit, it is not sufficient to show the fraud, but he must also establish the fact that the obligee as well as the principal intended to deceive, and that the fraud induced the plaintiff to execute the bond as surety.

3. Same—Evidence—Questions for Jury.

Where the surety for the faithful performance of a contract seeks to set the bond aside for fraud and deceit practiced upon it on the ground that the representations were made upon the basis that the contract called for a consideration to be paid by the obligee to its principal, and in fact it was for a preëxisting debt, and it was shown that the obligee was unaware of and had not participated in the fraud or deceit alleged; and the evidence is conflicting as to whether the fraud or deceit complained of had induced the plaintiff to execute the bond as surety, or

whether it was induced by the true representations made by the principal of its solvency, and valuable collaterals, etc., received by the plaintiff at the time, the evidence presents an issue of fact for the determination of the jury.

APPEAL by plaintiff from *Lane, J.*, at October Term, 1922, of BUNCOMBE.

Civil action brought by plaintiff against defendants to rescind and cancel a supply contract bond executed by the defendant Carolina Dray Company (hereafter called Dray Company), as principal, and the plaintiff Globe Indemnity Company, a corporation (hereafter called Indemnity Company), as surety. Said bond was payable to the defendant Sylva Tanning Company, a corporation (hereafter called Tanning Company). The defendant George V. Whitton was secretary and treasurer and general manager of the defendant Dray Company, and had complete control and management of its business, and who, on behalf of the corporation, signed the bond which this suit is brought to rescind and cancel.

On 11 November, 1920, the Indemnity Company made the usual bond in such cases to the Tanning Company, whereby it obligated itself as surety for the faithful performance by the Dray Company of its certain contract with the defendant Tanning Company. The obligation of the Dray Company under said contract, as recited in the bond, being: "Whereas the principal has entered into a certain written contract bearing the date 4 November, A. D. 1920, with the obligee, Sylva Tanning Company, Sylva, N. C., to deliver on board at cars at various shipping points on the Southern Railway acid wood, minimum carloads to average $500 worth a month, and to be fulfilled in 13 months to the total of $6,500, which contract is hereby referred to for the purpose of explaining this obligation." The premium charged and received for the bond was $89.75.

The Dray Company, on 5 November, 1920, made an agreement with the Tanning Company. The following is recited in the agreement: "Witnesseth: That for and in consideration of the sum of $6,500, to us this day advanced by the Sylva Tanning Company, Inc., of Sylva, N. C., the receipt of which is hereby acknowledged, the same having been paid to the undersigned Carolina Dray Company, Inc., and for other valuable consideration herein mentioned, we do hereby agree to sell, assign, set over and agree to deliver on board the cars to the Sylva Tanning Company, Inc., of Sylva, N. C., 900 cords of 160 cubit feet each of merchantable chestnut wood suitable for making extract for tanning purposes, same to comply with the specifications of the Sylva Tanning Company, a copy of which specifications is hereto attached and marked Exhibit 'A' and made a part of this contract. Said wood

to be delivered on board the cars in full minimum carloads at various stations on the Southern Railway lines in Western North Carolina, said wood to be delivered on board the cars, as above specified, on or before 1 December, 1921, the same to be delivered in equal monthly quantities of approximately 50 cords per month for shipment to the Sylva Tanning Company, Sylva, N. C., or to such other points as they, their successors or assigns, may herein direct, said wood to be cut and split according to the specifications hereinbefore referred to."

Paragraph 6 of the complaint alleges:

"That, as the plaintiff is informed and believes, the recital in the contract aforesaid of the consideration of 'the sum of $6,500 to us (Carolina Dray Company) this day advanced by the Sylva Tanning Company, of Sylva, N. C.,' was false to the knowledge of both parties to said contract, and was fraudulently introduced into said contract for the purpose and with the design of enabling the said Carolina Dray Company to overreach and defraud the plaintiff, the true facts in reference to said transaction being, as the plaintiff is informed and believes, as follows" (which are set forth in detail).

Paragraph 7 of the complaint alleges:

"That, as plaintiff is informed and believes, the defendant Sylva Tanning Company did not, at or about the time of entering into the aforementioned contract or at any other time, advance to the defendant Carolina Dray Company, or to any other person for it, the sum of $6,500 or any other sum whatsoever, with reference to said contract or the subject-matter thereof; that the true consideration of said contract was not a present advancement, as therein recited, but was a pre-existing and overdue debt of $6,464.42, owing by said Carolina Dray Company or said Whitton to said Sylva Tanning Company, and arising out of antecedent transactions between said parties."

Paragraph 10 of the complaint alleges:

"That all and every of the false and fraudulent representations and pretenses hereinbefore alleged were knowingly and wilfully made by the defendants Carolina Dray Company and George V. Whitton with the calculated purpose and intention of deceiving and defrauding the plaintiff, and they did deceive and defraud the plaintiff, and the plaintiff was thereby induced to accept and assume the risk and hazard of suretyship on the aforementioned bond; and the defendant Sylva Tanning Company, for its own advantage and gain, knowingly connived at and participated in all such the fraudulent conduct and intentions of its codefendants."

Before the contract of indemnity was signed the Dray Company, through its secretary and treasurer, George V. Whitton, was required to sign a supply contract application—usual form of such applica-

tions—giving financial statement of the Dray Company, showing in detail the assets and liabilities, the assets being $17,444 over the liabilities. In this signed statement was "Incumbrance on plant, $6,000; due on truck, $1,500." The Globe Company made a collateral agreement (their form 309, receipt No. 651) with the Dray Company, with the usual provisions. The following is on the agreement: "Received from the depositor named in the within agreement $8,000 in stock of company and *bona fide* sale of 1,000,000 feet of lumber as collateral security subject to all and singular the terms of the within agreement." The collateral agreement says: "Whereas, in consideration of the deposit of collateral security described in the receipt hereto annexed, the surety has executed or procured the execution of, or may hereafter execute or procure the execution of, obligations of guaranty and suretyship on behalf of Sylva Tanning Company."

The Tanning Company, in compliance with the requirements of its bond with the Indemnity Company, gave the monthly notices of the Dray Company not fulfilling its contract.

The Tanning Company, answering paragraph 6 of the complaint, says:

"Answering paragraph 6 of plaintiff's complaint, this defendant says that the consideration of sixty-five hundred dollars therein mentioned was for a good, sufficient and meritorious consideration, and is a true recital of the consideration passing from this defendant to the Carolina Dray Company, and this defendant emphatically denies that there was any fraud, deceit or any connivance on its part in any way whatsoever, and that it made no representations to the plaintiff nor did it endorse any representations made by the Carolina Dray Company.

"Further answering paragraph six this defendant says:

"That it had for some time been purchasing acid wood from the Carolina Dray Company, and that the Carolina Dray Company had received advancements from this defendant to purchase trucks, machines and other equipment in carrying on their wood operations, and had secured this defendant by a bill of sale for certain wood and by chattel mortgages upon its trucks, drays, machines and other equipment, and that as a part of the consideration mentioned in said contract was the release of said mortgage herein referred to in order that the said Carolina Dray Company might be free from indebtedness so that it could raise sufficient funds upon which to operate this wood contract; all other allegations in paragraph six are not within the knowledge of this defendant, and it demands strict proof thereof."

Answering paragraph seven of the complaint, the defendant Tanning Company says:

"Answering paragraph seven of plaintiff's complaint, this defendant, in consideration of the execution of the bond by the plaintiff, released

and discharged its mortgage and lien against the property of the Carolina Dray Company, which was equivalent to the advancement to it of the said sixty-five hundred dollars, and that it released said property and allowed the Carolina Dray Company to use said machines, drays," etc.

Answering paragraph ten of the complaint, the defendant Tanning Company says:

"Answering paragraph ten of plaintiff's complaint, this defendant does not know of the intentions of the Carolina Dray Company and George V. Whitton, and has no knowledge or information sufficient to form a belief as to any false representations made by him, and demands strict proof thereof, but this defendant expressly denies every allegation and intimation that this defendant, Sylva Tanning Company, knowingly connived or engaged in any representations whatever, either false or true, made by the defendant Carolina Dray Company and George V. Whitton, and expressly denies any knowledge of any representations made as set out in paragraph ten."

The defendant Tanning Company, further answering, says:

"The Carolina Dray Company, through George V. Whitton, applied to this defendant with the request that they cancel the mortgage upon said property in order that they might operate on a more extensive scale, and as an inducement to this defendant to release and cancel said mortgage, the Carolina Dray Company entered into a contract with this defendant to deliver the quantities of wood, and as a guarantee that it would deliver said wood therein specified, tendered to this defendant the bond as set out, whereupon this defendant did release and cancel said mortgages above referred to, the aggregate amount of which was $6,500; and, as this defendant is informed and believes, said chattel mortgages were amply secured, and that the property described therein was worth considerably more than the indebtedness against said property."

The defendants Carolina Dray Company and George V. Whitton filed no answer to the complaint.

The following judgment was rendered:

"This cause coming on to be heard at the October Term, 1922, of the Superior Court of Buncombe County, before his Honor, Henry P. Lane, judge presiding, and a jury, and the same being heard, and the following issues having been submitted to the jury, to wit:

"1. Was the plaintiff induced to execute the bond of 11 November, 1920, by reason of the false and fraudulent representations of the defendants Carolina Dray Company and George V. Whitton, as alleged in the complaint?

"2. Did the defendant Sylva Tanning Company have knowledge of and participate in such false and fraudulent representations as alleged in the complaint?

"3. What damages, if any, is the plaintiff entitled to recover?

"And the jury having answered the first of said issues 'Yes,' the second 'No,' and the third issue 'Nothing,' it is therefore, on motion, considered and adjudged by the court that the plaintiff take nothing by its said action against the defendant Sylva Tanning Company and that the defendant Sylva Tanning Company be allowed to go without day and recover of the plaintiff its costs in this action incurred, to be taxed by the clerk.

"And it is considered, adjudged and decreed by the court that the bond executed by the plaintiff on 11 November, 1920, and fully described in paragraph five of the plaintiff's complaint, constitutes and is a valid and binding contract and obligation between the parties thereto."

The plaintiff tendered judgment, the material part of which is as follows: "It appearing to the court by the admission in the answer of the defendant Sylva Tanning Company, that the contract of the defendant Carolina Dray Company with said defendant Sylva Tanning Company, recited in the bond set out in the pleadings for the purpose of explaining the obligation of said bond, was upon the consideration and to secure the payment of a preëxisting debt arising on former dealings between the said defendants, and that said contract was not upon the consideration of a present advancement, as recited in said contract." The court refused to sign the judgment tendered, and plaintiff excepted.

The court signed the judgment as set out in the record, and plaintiff excepted.

The plaintiff assigned as error the refusal of the court below to sign the judgment tendered by plaintiff and signing the judgment tendered by the Tanning Company, and appealed to this Court.

Carter, Shuford & Hartshorn and John L. Baker for plaintiff.

J. Scroop Styles and Alley & Alley for defendant Sylva Tanning Company.

CLARKSON, J. From the record in this case it appears that the issues submitted on the material allegations in the complaint and answer and unobjected to were as follows:

"(1) Was the plaintiff induced to execute the bond of 11 November, 1920, by reason of the false and fraudulent representations of the defendants Carolina Dray Company and George V. Whitton, as alleged in the complaint? To this issue the jury answered 'Yes.'

"(2) Did the defendant Sylva Tanning Company have knowledge of and participate in such false and fraudulent representations, as alleged in the complaint? To this issue the jury answered 'No.'"

In the record there are no exceptions to the court's charge, no prayer of the plaintiff for any instructions embodying its contention made here, but the only assignment of error is to the tender of judgment by the plaintiff which the court below refused to sign, in which the following is recited: "That the contract of defendant Carolina Dray Company with said defendant Sylva Tanning Company, recited in the bond set out in the pleadings for the purpose of explaining the obligation of said bond, was upon the consideration and to secure the payment of a preëxisting debt arising on former dealings between said defendants, and that said contract was not upon the consideration of a present advancement, as recited in said contract."

The other assignment of error is to the judgment as signed.

The issues were duly submitted to the jury. The presumption of law from the record is that the court below charged the law correctly bearing on the evidence as testified to by the witnesses at the trial. The verdict of the jury found that the Tanning Company did not have any knowledge of and participate in the false and fraudulent representations made by the Carolina Dray Company and George V. Whitton. No exceptions were taken to anything during the entire course of the trial until after the verdict.

The law presumes that the procedure in the court below was regular. The court should, in its sound discretion and good sense, instruct the jury on all the issues presented by the pleadings and the evidence. *Blake v. Smith,* 163 N. C., 274.

If the plaintiff had any objections to the charge of the court on the contentions he should have called it to the attention of the court. If he desired additional statements, he should have asked for them. He cannot remain silent, take the chance of winning a verdict, and object afterwards. He is too late. Silence seems to give consent. *Sears v. R. R.,* 178 N. C., 287.

The plaintiff now contends, after the verdict, "The obligee (Sylva Tanning Company) admits that the consideration of the contract upon which the bond was written was not a present cash advance of $6,500, as recited in said contract, and as surety believed it to be, but was a preëxisting debt." The record in the case also shows the collateral agreement made by the Dray Company with plaintiff that the written agreement states *"Whereas, in consideration of deposit of collateral described in the receipt hereto annexed,* the surety has executed or procured the execution of, or may hereafter execute or procure the execution of, obligation of guaranty and suretyship on behalf of Sylva Tanning Company."

On the collateral agreement is a receipt from the Dray Company: *"$8,000 in stock of company and bona fide sale of 1,000,000 feet of lumber."* The record also shows that the Dray Company was required to give a detailed financial statement and it had assets over capital stock of $17,444, and also reference statement to bank it did business with and manufacturer it did business with.

The Tanning Company in its defense says: "The Carolina Dray Company, through George V. Whitton, applied to this defendant with the request that they cancel the mortgage upon said property in order that they might operate on a more extensive scale, and as an inducement to this defendant to release and cancel said mortgage, the Carolina Dray Company entered into a contract with this defendant to deliver the quantities of wood, and as a guarantee that it would deliver said wood therein specified tendered to this defendant the bond set out in the complaint, whereupon this defendant did release and cancel said mortgages above referred to, the aggregate amount of which was $6,500; and as this defendant is informed and believes, said chattel mortgages were amply secured, and the property described therein was worth considerably more than the indebtedness against said property."

When the bond of the plaintiff was given, the Tanning Company canceled mortgages amounting to $6,500.

The Dray Company defaulted on its contract with the Tanning Company and it immediately notified plaintiff. The plaintiff waited some five months before bringing this action. These are succinctly the material facts.

This is an action on the ground of fraud or deceit to cancel and rescind the supply contract bond.

Brown, J., in *Pritchard v. Dailey,* 168 N. C., 332, says: "The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are well settled. First, there must be a misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with the intent to influence the action of others; third, the misrepresentations must be calculated to deceive and must actually deceive; and fourth, the party claiming must have actually relied upon the representations." *Lunn v. Shermer,* 93 N. C., 169; *Bank v. Yelverton,* 185 N. C., 318.

In *Black v. Black,* 110 N. C., 399, *Hoke, J.,* when on the Superior Court bench, in a case of deceit, gave this charge: "That in order to maintain his action it was necessary for plaintiff to establish that the mule was unsound; that defendant falsely and fraudulently asserted it to be sound; and that these false representations induced plaintiff to make the trade. If plaintiff was not, in fact, misled by defendant, but

acted on his own judgment in making the trade, they should find that he was not thereby induced to part with his property." *Merrimon, C. J.,* in sustaining this charge, said: "This plainly implied that the plaintiff could not recover if he took the mule at his own risk, relied and acted upon his own judgment. The evidence was conflicting, presenting two distinct aspects of it—one favorable to the plaintiff; the other to the defendant. The Court referred to it in detail, pointing out its bearing upon the several issues. The charge was intelligent, very fair, sufficiently specific and full, and we are unable to discover any error that entitles the defendant to a new trial."

In *S. v. Moore,* 111 N. C., 672, *Avery, J.,* says: "As well in civil actions, brought to recover of another for losses incurred by false representations, as in criminal prosecutions founded upon the same species of fraud, the burden is on the actor or prosecutor to show not only the false representation, but that a reasonable reliance upon its truth induced the plaintiff or prosecutor to part with his money or property, the only difference being as to the *quantum* of proof." *S. v. Davis,* 150 N. C., 853.

Admitting that there was no cash advance of $6,500, but it was a pre-existing debt, did this false representation induce plaintiff to make the supply contract bond? Did plaintiff actually rely on the representations, or did it rely on the information it had obtained of the Dray Company's financial statement—*collateral*—as its collateral agreement says, signed by it, "Whereas, in consideration of the deposit of collateral security in the receipt hereto annexed," etc., the collateral being $8,000 in stock of company and *bona fide* sale of 1,000,000 feet of lumber? This collateral may have turned out afterwards to be of small value. Was this not a question for the jury on all the evidence? We think it was.

Nash, J., in *Stafford v. Newsom,* 31 N. C., 510, says: "The action for deceit rests in the intention with which a representation is made, or a fact not mentioned. It was not sufficient that the representation made should be calculated to mislead—for that may be done by the most honest communication—but the representation must be made with the intent to deceive. Moral turpitude is necessary to charge a defendant in an action for a deceit."

In *Magee and others v. Manhattan Life Ins. Co.,* 92 U. S., p. 93, the facts are: "In a suit by a company organized under the law of the State of New York against citizens of the State of Alabama, on a bond conditioned for the faithful performance of duty, and the payment of money received for it, executed by the agent of the company who transacted business as such in the city of Mobile, where he resided, and by them as his sureties, the latter pleaded that the company, as a condition

upon which it would retain in its employment the agent then largely indebted to it, required such bond, and also his agreement to apply all his commissions thereafter earned to his former indebtedness to it; that the agreement was made, and the commissions were so applied; that the company knew that the agent had no property, and depended upon his future acquisitions for the support of himself and family; that the defendants were ignorant of such indebtedness and agreement; that, had they been informed thereof, they would not have executed the bond; that the agreement as to the commissions and its performance were a fraud on them; and that the bond as to them was thereby avoided." *Mr. Justice Swayne,* on p. 98, says: "A surety is a 'favored debtor.' His rights are zealously guarded, both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability; and if the case against him be not clearly within it, he is entitled to go acquit. *Ludlow v. Symonds,* 2 Caine's Cas., 1; *Miller v. Stewart,* 9 Wheat., 681. But there is a duty incumbent on him. He must not rest supine, close his eyes and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract. Kerr on Fraud and Mistake, 96."

The many cases cited in the briefs of counsel on both sides have been carefully considered. We cannot sustain plaintiffs' assignments of error. We think the court below was correct in the judgment rendered. The question was one of fact for the jury.

From the record we can find no prejudicial or reversible error.

No error.

BETSY LONG v. THE TOWN OF ROCKINGHAM.

(Filed 20 February, 1924.)

1. Constitutional Law—Statutes — Due Process — Appeal — Condemnation—Public Use.

Though our State Constitution is silent upon the subject, in order to take private property by condemnation for a public use, it is necessary for a statute permitting it to require just compensation to be paid the private owner of land so taken, and to provide that the owner be heard in the proceedings upon notice, with further right of appeal to the court in conformity with the due-process clause.

2. Same—Procedure.

A statute permitting a municipal corporation to take private property for a public use, by condemnation, should be substantially followed by a municipality in taking advantage of its provisions, and the statute will not be declared invalid unless the nullity of the act is beyond a reasonable doubt.

3. Same—Cemeteries.

Where the charter of a city or town provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (C. S., 1724), applying to municipal corporations, this right of appeal is preserved, and the charter provisions of the city or town will not be declared for that reason unconstitutional by the courts.

4. Same—Guardian and Ward.

Where an infant is the owner of lands sought to be condemned by a municipality for cemetery purposes, such infant must defend by her general guardian, where one has been appointed (C. S., 451); and where service of process has been made upon the general guardian, and it appears upon the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. C. S., 921.

5. Same.

Where the general guardian has been made a party to proceedings to condemn land by a municipality of his ward's land for cemetery purposes, he is the proper one to appeal to the Superior Court, and prosecute it when dissatisfied with the value placed upon the ward's lands by the assessors appointed under the statute.

6. Guardian and Ward—Settlement—Receipt—Acquittance—Election of Remedies.

Where the general guardian has appealed in condemnation proceedings to the Superior Court from an assessment made of the value of his ward's land, and has in good faith agreed upon the value at a much better price, which was paid and incorporated specifically in the final settlement with his ward, who, aware of the circumstances, had accepted it and given a full acquittance in writing, in her action against the city, brought nearly two years afterward: *Held*, that she had been put to her election to affirm or disaffirm his action within a reasonable time after reaching her majority, and her testimony that she was unaware that it was included in her acceptance raised an issue of fact for the jury to determine, and it was reversible error for the judge to hold in her favor as a matter of law.

7. Same—Evidence—Process—Endorsements.

A receipt and full acquittance by the ward upon coming of age, given to the guardian, are *prima facie* evidence that they spoke the truth.

APPEAL from *Harding, J.*, at March Term, 1923, of RICHMOND.

Civil action. In this cause a complaint was filed, and an answer, an amended complaint, and an answer thereto, and a reply.

The plaintiff, Betsy Long, brought this action against the defendant, the town of Rockingham, to recover possession of about 10 15-16 acres of land near the town of Rockingham, which she claimed was illegally taken by the town of Rockingham and used as a cemetery, and for damages.

The defendant, town of Rockingham, admits it took possession of the land, but contends that it did so legally, under power and authority given it in its charter and the laws of North Carolina applicable to municipal corporations, for cemetery purposes; that the land was condemned in accordance with law; that she and her guardian were served with process, and her general guardian, W. F. Long, her uncle, was paid full value for the land, more than the jurors allowed. The jurors assessed the land at $350 an acre, and her guardian appealed from the assessment and afterwards accepted $4,375 from the town of Rockingham in full for the land; that his returns as guardian for Betsy Long, in the clerk's office for Richmond County, shows:

"25 October. To cash from town of Rockingham for 10 15-16 acres land condemned for cemetery purposes, $4,375."

That each year, from 1913 until Betsy Long became of age, the guardian accounts of W. F. Long showed that she was allowed 6 per cent interest on this amount; that Betsy Long became of age 17 April, 1919, and she gave her guardian, W. F. Long, receipts for what he owed her as guardian, 28 April, 1919, $5,832.94; 19 June, 1919, $1,673.60 in bonds and war savings stamps; and the final receipt, with statement of account, was as follows:

"$2,031.59. Received of W. F. Long, my guardian, $2,014.55 and $17.14 interest in full settlement of all sums due me, and I hereby release him and his sureties on his bond of any further liability by reason of his guardianship.

"This 19 June, 1919. BETSY LONG."

That in the sums paid Betsy Long was the amount W. F. Long, her guardian, received from the town of Rockingham, with 6 per cent interest; that she received said sum with full knowledge of all the facts; that the town of Rockingham took possession of the land and has been selling it off in lots for burial purposes; that it and the persons who have purchased lots have spent large sums of money in beautifying the property; that during all of which time Betsy Long and her guardian, her uncle, W. F. Long, have had knowledge of the use made of the property and expenditures; that she came of age 17 April, 1919, and waited nearly two years before beginning this action, 4 April, 1921.

The defendant, town of Rockingham, in its answer, alleges: "The plaintiff has thereby, and by her other acts and acquiescence in said procedure since she attained her majority, ratified and confirmed the acquisition of said tract of land described in the complaint by the town of Rockingham, as aforesaid set forth, and the plaintiff, by her conduct and by said affirmance and acquiescence and by the procedure aforesaid set forth in this answer, is estopped to assert title or any other interest in and to the tract of land described in the complaint, as defendants are informed, advised and believe, and therefore allege."

The defendant, Betsy Long, replies and says: "That there has never been any valid condemnation by the town of Rockingham of any of the lands of plaintiff, and the defendant, town of Rockingham, abandoned even the attempted condemnation and attempted to purchase plaintiff's lands from her guardian, but plaintiff avers that her said guardian had no authority to sell any of her lands to the defendant, and that he made no written contract with the defendant for the sale of any of her lands, and that any attempted verbal contract on his part was and is null and void and incapable of ratification, and she avers that she has never ratified same, and she pleads the statute of frauds in bar of any such alleged contract."

There were seven issues submitted to the jury. We will only consider three we think necessary for the consideration of this case, which are as follows:

"1. Was the land described in article 2 of the amended complaint condemned for the use of the defendant as a cemetery under the charter of the defendant and the general laws of the State in the years 1912 and 1913, as alleged in the answer?

"2. Did the plaintiff, after she reached the age of twenty-one years, by acts of her own, waive her right to recover the possession of the land and damages for the taking thereof?

"3. Is the plaintiff the owner of the land described in the amended complaint?"

The defendant has in the record seventy-seven exceptions and assignments of error. The issues submitted, and the charge of the court on these issues, were duly excepted to. The charge of the court on these three issues was as follows:

"The court is of the opinion that there is not sufficient evidence to warrant the jury in answering that issue 'Yes'—that is, that there is not sufficient evidence to go to the jury on the question of condemnation, and directs that you shall answer the first issue 'No,' and the court has answered it for you.

"The court is of the opinion that there is not sufficient evidence to go to the jury in warranting them in finding there was a waiver, if they

should find the evidence to be as testified to by the defendant or by all the evidence; so the court directs you to answer the second issue 'No,' and the court, to relieve you of that, has already answered it; so you should not disturb yourselves about the first and second issues.

"The court charges you that if you believe the evidence you will answer that issue—the third issue—'Yes.' "

There was a judgment for plaintiff, and the defendant excepted and appealed to this Court. The other material facts will be set forth in the opinion.

Ozmer L. Henry, H. S. Boggan, and Parker & Craig for plaintiff.
J. C. Sedberry, U. L. Spence, and Pou, Bailey & Pou for defendant.

CLARKSON, J. The first issue submitted to the jury raises the question of law—the validity of the condemnation proceeding and constitutionality of the statutes.

In *Coble v. Comrs,* 184 N. C., 348, this Court said: "We should apply the principle that every presumption is to be indulged in favor of the validity of the statute, that the General Assembly is presumed to have acted with an honest purpose to observe the restrictions and limitations imposed by law, and that legislation will be sustained unless its invalidity is 'clear, complete and unmistakable,' or unless the nullity of the act is beyond a reasonable doubt," citing authorities. *Person v. Doughton,* 186 N. C., 723.

In *Parks v. Comrs.,* 186 N. C., 498, it was said: "It is frequently a perplexing problem to tell how far the individual has to yield his personal and property rights for the common good." . . .

"Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State (*S. v. Newsom,* 27 N. C., 250), yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." *Johnston v. Rankin,* 70 N. C., 555. See, also, *S. v. Lyle,* 100 N. C., 497.

The rights of municipal corporations has recently been thoroughly discussed in *Gunter v. Sanford,* 186 N. C., 461, by *Adams, J.* He said, in part: "In our opinion, the statutes in question do not offend against the State Constitution or the due-process clause of the Federal Constitution. On the other hand, they afford the plaintiffs adequate means litigating the matters in controversy before the board of aldermen, and if desired, by appeal from their decision to the Superior Court."

"Where the Legislature has prescribed a method of procedure, the statute on the subject must ordinarily be followed." *Clinton v. Johnson,* 174 N. C., 286; *Proctor v. Comrs.,* 182 N. C., 59; *Parks v. Comrs., supra,* 497.

The acts of the General Assembly, the charter of the town of Rockingham and the amendments thereto were introduced in evidence by the defendant in the trial of the cause in the court below.

Private Laws 1909, ch. 161, introduced in evidence, provides: "That the board of commissioners of the town of Rockingham shall have the right, either within or without its corporate limits, to condemn land for cemetery uses, as now provided by its charter for the condemnation of land for streets or other purposes."

The original charter of the town is found in Private Laws 1887, ch. 101.

Section 26, as amended by Private Laws 1911, ch. 264, relates to condemnation of land for streets and other purposes.

It is contended by plaintiff that the charter under which the town proceeded to condemn plaintiff's land made no provision for condemning infants' lands. The charter provides, "to condemn land for cemetery uses." The language is broad and comprehensive and should not be restricted. The intention of the Legislature, if the language is not in direct terms, it was by necessary implication, to condemn any one's land—man, woman, infant, etc. It was for a sacred purpose—the burial of the dead.

The instant case is different from that of *Eppley v. Bryson City,* 157 N. C., 487, cited by plaintiff. That case decides: "An incorporated town was authorized to erect, own and operate an electric plant under chapter 217, Private Laws 1911, conferring the power of condemnation 'in the same manner as is now provided by law for the condemnation of lands for streets.' The charter of the town contains no method of procedure for condemning lands for streets. *Held,* that to lawfully authorize a municipal corporation to exercise the right of eminent domain the power must be expressly conferred or arise by necessary implication, and the procedure necessary to give it effect must be provided; but a valid exercise of this power may be done by the municipality under the general law (chapter 86, section 1, Public Laws 1911), where all requisite powers are conferred."

In the case at bar the charter contains a method of procedure. Section 26, *supra.*

(1) The commissioners are given the power to condemn and appropriate any land necessary for cemetery uses whenever a majority of them may think necessary or advisable, on making compensation.

The minutes of the board of commissioners of the town of Rockingham, held on 14 May, 1912, shows the following:

"On motion, the mayor is instructed to condemn what land is necessary for the enlargement of Eastside Cemetery, and is to consult attorney in manner to proceed."

4 November, 1912, shows the following:

"On motion, the mayor is directed to take whatever steps that are necessary in condemning land for the enlargement of Eastside Cemetery, and report to board as soon as possible."

(2) It shall be the duty of the commissioners of said town to tender, through their clerk and treasurer, the amount they may think the owner of any land may be entitled to as damages.

3 December, 1912, shows the following:

"On motion, the following order was passed as to condemning additional land for Eastside Cemetery purposes, and the treasurer was instructed to make the several tenders to parties named, as soon as possible, and report his action to board:

"Order.—It appearing to the board of commissioners of the town of Rockingham that additional land is necessary for burial purposes, it is therefore ordered that the clerk to this board is authorized, directed and empowered to tender to the persons hereinafter named the amount placed opposite each name in full satisfaction of their lot or parcel of land, hereinafter described, situate near and adjacent to Eastside Cemetery, and described more fully by plot made by C. M. Furman, Jr., on file in the office of the clerk to this board:

"To Hal Cole, $500 for the following described lot. . . .

"To Mary Fletcher, $500 for the following described lot. . . .

"To Charlie Esau Leak, $600 for the following described lot. . . .

"To W. F. Long, guardian of Betsy Long, $125 per acre for a tract containing 10 15-16 acres, more or less, described as follows. . . .

"It is further ordered that in case the parties mentioned above should refuse to accept the amount tendered in full satisfaction for the land above described, that the mayor cause a notice to be served on the parties above named, and directing J. E. Young, chief of police, to summons a jury and condemn the above-described lands, as is prescribed by law.

"Payment tendered each of the above-named parties and refused.

"This the 9th and 10th day of December, 1912.

W. L. SCALES, *Clerk and Treasurer.*"

(3) If such amount should not be accepted in full satisfaction therefor, the mayor of the town shall have the power to issue an order directed to the town constable or other officer commanding him to

summons as jurors three citizens of said town, freeholders, *connected neither by consanguinity nor affinity with the mayor or commissioners of said town or the person or persons whose land is to be condemned.* (Italics ours.) Said order shall direct the town constable or other officer to summons said jurors to meet on the land to be condemned on a day not exceeding ten days from the day of summoning them, and the owner or owners of said lands shall be notified by the constable or other officer of said town of the summoning of said jurors, and the time and place of their meeting and the purpose of their meeting, for five days before the day when the said jurors will meet to condemn the land.

The following is the summons:

"OFFICE OF BOARD OF COMMISSIONERS,
TOWN OF ROCKINGHAM, N. C.
W. N. EVERETT, *Mayor.*

"NORTH CAROLINA,
RICHMOND COUNTY.

"To J. E. Young, Chief of Police:

"You are hereby commanded to summon Wm. Entwistle, J. P. Maurice, and J. W. Brigman to meet on Monday, 23 December, 1912, at 3 o'clock p. m., on the premises adjacent to the Eastside Cemetery lot, belonging to Hal Cole, Mary Fletcher, Charlie Esau Leak, and Betsy Long, for the purpose of assessing the damages that may accrue to the owners thereof by condemning it for the use of a public burial ground.

"Herein fail not, and of this summons make due return. Witness my hand, this 17 December, 1912.

W. N. EVERETT,
Mayor of the Town of Rockingham."

On the back of the summons appears the following:

"The Town of Rockingham v. Hal Cole et al. Summons. Jury: Wm. Entwistle, J. P. Maurice, J. W. Brigman. Received 17 December, 1912; served 18 December, 1912. J. E. Young, Chief of Police. Written notice served on Hal Cole, Mary Fletcher, and Charlie Esau Leak, 17 December, 1912, and on Betsy Long and W. F. Long, guardian, 18 December, 1912, reciting the date the jurors met, at what place, and the purpose of this meeting. J. E. Young, Chief of Police."

(4) Said jurors, attended by the constable or other officer, after being sworn by the mayor *to do strict and impartial justice between the*

parties (italics ours), shall proceed to condemn the land and shall assess the damages sustained by the owner or owners of such land; and the said jurors shall, under their hands and seals, make a return of their proceedings to the mayor of said town, and the board of commissioners of the said town shall make compensation to such owner or owners of said land for the amount of damages so assessed by said jurors, or a majority of them, on the return of the report of said jurors to the mayor of said town, and the payment or tender of payment to the owner or owners of said land by the town clerk and treasurer, under the order and direction of said commissioners of said town of the amount of damages so assessed, by said jurors or a majority of them, said land condemned shall be in all respects under the control of the board of commissioners of said town.

The following is the report of the jurors:

"CONDEMNATION PROCEEDINGS—REPORT OF JURY.

"In re The Town of Rockingham, N. C., v. Hal Cole, Mary Jane Fletcher and Betsy Long, by her Guardian, W. F. Long.

"To W. N. Everett, Mayor of the Town of Rockingham:

"We, the undersigned jurors, appointed and summoned to assess the damages that will be sustained by Hal Cole, Mary Jane Fletcher and Betsy Long, the owners of certain lands lying in the county of Richmond, and situate near Eastside Cemetery, which the said town proposes to condemn for its use as a public burial ground, met on 27 December, 1912, the day to which we were regularly adjourned, after first having met on 23 December, and after first having been duly sworn, we visited the premises of the owners, and after taking into full consideration the quality and quantity of the lands aforesaid and all losses likely to result to the owners, we have estimated and do assess the damages aforesaid as follows:

"To Hal Cole—$1,600 for the following described lot: Describing it.

"To Mary Jane Fletcher—$1,000 for the lot described as follows: Describing it.

"To Elizabeth (Betsy) Long—$350 per acre for a tract containing ten and fifteen-sixteenths acres, described as follows: Describing it. Total, $3,828.12.

"Given under our hands and seals, this 27 December, 1912.

WM. ENTWISTLE. (SEAL.)
J. W. BRIGMAN. (SEAL.)
J. P. MAURICE. (SEAL.)"

EXCEPTIONS FILED BY W. F. LONG, GUARDIAN OF BETSY LONG.

"W. F. Long, guardian of Elizabeth Long, appeals from the assessment made by Entwistle, Brigman, and Maurice of land belonging to his said ward, for the following reasons:

"1. That said valuation is not as much as the land is worth, and much below what the same will sell for on ten seconds notice.

"And the following exceptions are made as to the appointment of the assessors or jury:

"(1) That the landowners had no say as to who said jurors should be, and were not consulted as to same.

"(2) That the law requires freeholders to perform such service, and in this case was not complied with."

24 June, 1913, shows the following:

"On motion, it was ordered that $350 per acre for ten acres be tendered W. F. Long for land for cemetery purposes and that surveyor be employed to begin work on same. Motion amended to employ landscape gardener to do the work."

3 September, 1913, shows the following:

"Mr. W. F. Long, guardian, made the town an offer to accept $4,000 for the ten acres land adjoining the Eastside Cemetery, and on motion of Gore, seconded by Whitlock, it was decided that this offer be accepted."

7 October, 1913, shows the following:

"Motion Mr. Gore, seconded by Mr. Barrett, that papers of W. F. Long, guardian of Betsy Long, be accepted for cemetery lot at $400 per acre for the 10 and 15-16 acres, when papers are approved by Attorney McLendon. Motion carried."

We give above the substance of the charter and the manner in which the plaintiff's land was condemned.

The constitutionality of the statute and the validity of the proceedings presents serious questions:

(1) The first tender before the assessment of damages made under the statute was made not to the owner, but to W. F. Long, guardian of Betsy Long, the plaintiff. The guardian refused this tender. Then the jurors were summoned and regular notice served on the owner, Betsy Long, and her guardian, W. F. Long. She and her guardian had notice of the time and hour the jurors were to meet, viz.: "Monday, 23 December, 1912, at 3 o'clock p. m., on the premises." As far as the record discloses, the jurors met at the place and time appointed and adjourned to 27 December. They were duly sworn and made their report.

Did the plaintiff, Betsy Long, have her "day in court?"

The first tender, although not made to Betsy Long, but her guardian, we do not think material as she was not prejudiced, as the amount afterwards paid her guardian exceeded several times the amount tendered. She was tendered $125 per acre and the amount paid her guardian was about $400 per acre. The tender was a formal and not a material matter. *Dudley v. Tyson,* 167 N. C., 67. The officer's return shows that she and her general guardian were both personally served. In the view we take of this case, the remedy, if plaintiff had one, was a motion in the cause to set aside the proceeding. We have not overlooked her evidence (which was excepted to by defendant) and is as follows:

"Q. Miss Betsy, did Mr. J. E. Young or any one else ever read a summons or notice to you that they were going to condemn any of your land in 1912 or 1913 or any other time? Answer: 'No, he did not.'"

C. S., 921, is as follows: "When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service."

In *Lake Drainage Comrs. v. Spencer,* 174 N. C., 36, it is held: "The sheriff's return showing service of summons on defendant in an action, in this case proceedings to establish a drainage district, is taken as *prima facie* correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person to overturn the official return of the officer. Revisal, 1529 (C. S., 921)." See cases cited and *Caviness v. Hunt,* 180 N. C., 386.

In the *Caviness case, supra,* 384, *Allen, J.,* says: "It makes little difference whether this action is called one to remove a cloud from title or to invoke the aid of a court of equity to prevent an injustice, its purpose is to set aside a judgment, regular on its face, and rendered on process showing service, and under such conditions the law furnishes a complete and adequate remedy by motion in the original action. The authorities in support of this principle are numerous, and it is correctly stated in *Stocks v. Stocks,* 179 N. C., 288, as follows: 'Where it appears that summons has been served, when in fact it has not been, the remedy is by motion in the cause to set aside the judgment, and not by an independent civil action, but when it appears on the record that it has not been served, the judgment is open to collateral attack. *Doyle v. Brown,* 72 N. C., 393; *Whitehurst v. Transportation Co.,* 109 N. C., 342; *Carter v. Rountree, ibid.,* 29; *Rutherford v. Ray,* 147 N. C., 253; *Rackley v. Roberts,* 147 N. C., 201; *Bailey v. Hopkins,* 152 N. C., 748; *Hargrove v. Wilson,* 148 N. C., 439; *Glis-*

son v. Glisson, 153 N. C., 185; *Barefoot v. Musselwhite, ibid.,* 208.'" When the special statute is silent by analogy, ordinarily, we think the general statute applicable.

The plaintiff in the proceedings was represented by her general guardian. When she was served, if she had no general guardian, then a guardian *ad litem* could have been appointed.

C. S., 451, is as follows: "In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons *non compos mentis,* whether residents or nonresidents of this State, they must defend by their general or testamentary guardian, if they have one within this State; and if they have no general guardian or testamentary guardian in the State, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian *ad litem,* to defend in behalf of such infants, idiots, lunatics, or persons *non compos mentis,*" etc.

The guardian had a right of appeal under the general statute, which is broad and comprehensive. It is Public Laws 1893, ch. 148, and is entitled "An act to secure the right of trial by jury in certain cases." In C. S. it is section 1724: "*Provision for jury trial on exceptions to report.* In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the Superior Court in term, if upon the hearing of such appeal a trial by a jury be demanded." *Cook v. Vickers,* 141 N. C., 107.

Under the charter of the town of Rockingham, the right to condemn for cemetery uses was made the same as provided for condemning land for streets. We think the charter of the town of Rockingham in reference to condemnation of the land for cemetery purposes constitutional, and the procedure valid and substantially complies with the statute. *R. R. v. Ely,* 95 N. C., 77; *S. v. Lyles,* 100 N. C., 497; *S. v. Jones,* 139 N. C., 613, and cases cited. We repeat what was said in *Parks v. Comrs., supra,* 499: "The power that can be granted to local governmental agencies, unless restrained by constitutional provision, are broad and comprehensive. *The powers when granted should be exercised with care and caution.*" (Italics ours.)

The second issue raised the question of ratification after the plaintiff came of age.

In *Norwood v. Lassiter,* 132 N. C., 55, *Walker, J.,* said: "When the plaintiff received the money he did something that was utterly inconsistent with his right to repudiate or disaffirm the sale. When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once for all, what he will do, and when his election is once made, it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart,* 126 N. C., 525. He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale. *Kerr v. Sanders,* 122 N. C., 635; *Mendenhall v. Mendenhall,* 53 N. C., 287. It is familiar learning that when two inconsistent benefits or alternative rights are presented for the choice of a party, the law imposes the duty upon him to decide as between them, which he will take or enjoy, and after he has made the election he must abide by it, especially when the nature of the case requires that he should not enjoy both, or when innocent third parties may suffer if he is permitted afterwards to change his mind and retract."

In this action there is no allegation of fraud or deceit. The action is brought on the ground that the act is unconstitutional and the proceedings thereunder is invalid. The whole procedure void—not irregular or voidable.

The evidence undisputed was that the plaintiff lived in the town of Rockingham. It was her home. Her uncle, W. F. Long, was her general guardian. The land condemned for cemetery purposes were 10 15-16 acres on a public highway near the old cemetery, close to the town limits of Rockingham. She lived most of the time with her guardian, W. F. Long, and the last six years before the trial with W. F. Long, Jr. She went to the graded school in Rockingham and left when in the ninth grade and went to Belmont School and Peace Institute. She said: "I testified in the other trial of this case that I knew the cemetery was on my land or the land I claimed, and this is true, and I have known this from the beginning." She had a settlement with her guardian after she came of age and signed the receipts for the items of money turned over to her. She further said: "My guardian is still living; he is right over there (meaning in court). The best relations existed between me and my uncle, who was my guardian, and have existed during all my life. When I signed those receipts shown me and attached to defendant's Exhibit 1, I knew I was making a final settlement with my guardian; that is what I went to his office for. He made a final settlement with me there. He turned over the property to me that belonged to me."

On redirect examination she stated: "At the time I signed those receipts I did not read them; I do not know what was in them.

"Q. Did you know there was any attempt on the part of any one to sell your land out there? Answer: 'No, sir.'

"Q. Did you know there had been any attempted condemnation of any of it? Answer: 'No.'"

The guardian returns of W. F. Long shows that on 4 April, 1913, he had on hand $3,709.87, and on 25 October, 1913, he had this additional sum, "To cash from town of Rockingham for 10 15-16 acres of land condemned for cemetery purposes, $4,375." Plaintiff's personal estate was increased over double when she was about 13 years of age, and from the returns her income—interest on the money—was more than doubled and each year accounted for in her guardian's return. She received and receipted for this additional fund coming from the town. She waited two years after arriving of age before bringing this action.

If the condemnation proceeding had been irregular or voidable, there was far more than a scintilla of evidence to go to the jury on her ratification with knowledge. The receipt and release were *prima facie* evidence that it spoke the truth and was correct.

The third issue was: "Is the plaintiff the owner of the land described in the amended complaint?" From the view taken of this case, we think the court below was in error in its charge on this issue.

W. F. Long was the general guardian of Betsy Long; was entrusted with her estate. He gave bond as such guardian as required by law. He was the uncle of the plaintiff. The statute put on him the responsibility when she and he were notified to appear and do all that was reasonable and necessary to protect the rights of his ward and niece. He was present when the jury met, and after the jurors made their report he filed exceptions, but did not perfect the appeal and took the money and allowed the defendant to take possession of the property and use it as a burial ground for the dead. He stated, "I told the attorney for the board that if they would make the amount $400 that I would not pursue the appeal."

Sec. 3, 11 C. J., p. 1123, says: "In the absence of any statutory restriction, a guardian has authority to compromise a claim existing in favor of his ward, provided he acts in good faith; but the ward is not bound by a compromise which is unfair or fraudulent or is not made in good faith." *Bunch v. Lumber Co.,* 174 N. C., 8; *Culp v. Stanford,* 112 N. C., 664; *Luton v. Wilcox,* 83 N. C., 20. See, also, *Rector v. Logging Co.,* 179 N. C., 62.

The town, in good faith, with the consent of W. F. Long, guardian of Betsy Long, took possession of the land and has sold lots, since the condemnation, to various parties, and it has been beautified and ever

since has been used as a sacred place—the burial of the dead. The plaintiff received the money for this burial ground from her uncle, her general guardian, and released him and his sureties from any liability. If he had not performed in good faith his duty to her as guardian and squandered her estate, or was recreant to any trust the law imposed on him as such guardian, she could have sued him. In the instant case, if his conduct was collusive and in fraud and in substantial prejudice of her rights, she could have sued him. She says, "The best of relations existed between me and my uncle, who was my guardian, and have existed during all my life." The record shows he made regular annual returns—itemized and accounted to her for the interest on the money each year. We are asked to declare void a legislative act—which our decisions have uniformly held could not be done *"unless the nullity of the act is beyond a reasonable doubt."* We are asked to declare invalid what the mayor and town commissioners of Rockingham did—in good faith, under legislative authority. What the jurors were sworn to do—"strict and impartial justice between the parties." What W. F. Long, the uncle and the general guardian of the plaintiff, did. Under all the facts and circumstances of this case, we think, for the reasons given in this opinion, in the charge of the court below there was error, and there should be a

New trial.

I. G. GREEN AND J. V. GRAGG v. ELIZA P. HARSHAW.

(Filed 20 February, 1924.)

1. Pleadings—Equity—Specific Performance.

A suit for specific performance of a contract to convey lands will not be dismissed for insufficiency of allegations to maintain an action for the relief sought when it contains a prayer to that effect, and, construing the complaint liberally, the allegations appear to be sufficient.

2. Same—Actions at Law—Constitutional Law.

Where the complaint is construed to be sufficient to sustain the suit for specific performance, objection for indefiniteness or that the action sounded in damages in a court of law, must be made in apt time; and where a good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by Constitution of North Carolina, Art. IV, sec. 1.

3. Evidence—Contracts—Written Instruments—Ambiguity.

A latent ambiguity in the description of a deed or contract to convey lands may be aided by parol evidence to fit the land to the description.

4. Same—Deeds and Conveyances—Description—Statute of Frauds.

Where the owners of land have entered into a writing sufficient under the statute of frauds to make a binding obligation upon them to convey it, and to sustain a suit for specific performance, a description of a tract of land known by a certain name and containing a certain number of acres may be shown by parol to include certain dwellings on lands that had been used in connection therewith, and contained within the acreage and boundaries of the lands known by the name designated, and apparently included in the consideration agreed upon by the parties.

5. Same—Fraud—Mistake.

Where the owners of lands have agreed to convey them in a writing sufficient under the statute of frauds, they will be bound to specifically perform it, and objection that the deed tendered by them, which did not conform to the description in the contract, could not be set aside except for fraud or mistake, is untenable.

6. Same—Principal and Agent.

Evidence is held sufficient in this case to be submitted to the jury upon the question of agency and ratification by the principal in the execution of a written agreement, which tends to show that the principal had desired to sell her interest in the land under the contract, had participated therein, and had afterwards received her proportionate part of the consideration.

7. Same—Specific Performance—Equity—Burden of Proof—Trials.

Where the owners of land have entered into a sufficient writing under the statute of frauds to sustain a suit for specific performance of a contract to convey land, and there is no element of fraud or mutual mistake involved in the written contract to convey, and the defendants have tendered a deed conveying only a part of the land contracted for, the plaintiffs seeking this relief have only the burden of satisfying the jury of their demand for the relief sought by the greater weight of the evidence.

8. Same—Principal and Agent—Parol Evidence.

Parol evidence of agency for the sale of land is only competent where the written contract contains a latent ambiguity, and is inadmissible to vary, alter or contradict the unambiguous terms of the written instrument.

APPEAL by defendant from *Finley, J.*, and a jury, at February Term, 1923, of CALDWELL.

The plaintiffs allege, in part:

"That on 11 June, 1921, the defendants, Eliza P. Harshaw, Hal C. Martin and Johnsie Martin, executed and delivered to J. W. Self, a real estate dealer of Caldwell County, North Carolina, a written contract in words and figures as follows:

"PROPERTY CONTRACT.

J. W. SELF, *Real Estate.*

LENOIR, N. C., 11 June, 1921.

"The following is a full description of my property, which J. W. Self is authorized to offer for sale according to terms specified below:

"Character, farm. Location, Collettsville, N. C. Distance from Lenoir, 10 miles. Size of lot, 135. Number of acres in cultivation, 10; bottom, 10. Timber, ... Total, ... Character of timber, ... Dwellings, 2. Rooms, ... Stories, ... Condition, fair. Apple trees, peach trees. Other fruit, ... Water supply, spring.

"Lowest price, $8,000 net to owners.

"Terms of payment: $5,000 cash. Balance 12 months, with interest from date of sale.

"It is agreed that graveyard shall be exempted, suitable size."

The latter part of the contract says: "The above described tract of land is known as the Harshaw Land."

"That after said 11 June, 1921, and prior to 20 June, 1921, the plaintiff, I. G. Green, agreed and contracted to purchase the said land referred to in the said paper-writing (property described in contract with J. W. Self), it being agreed between him and his coplaintiff, J. V. Gragg, that said Gragg contracted to furnish a part of the purchase price of the land described in said paper-writing, and the said I. G. Green would, after acquiring said title thereto, convey a portion of said lands thereby acquired and purchased to the said J. V. Gragg.

"That the defendants, Eliza P. Harshaw, Hal C. Martin and Johnsie Martin, by deed dated 20 June, 1921, undertook to convey, and as plaintiffs are advised, believe and allege, did convey all their right, title and interest to the plaintiff, I. C. Green, to the lands described in the paper-writing of 11 June, 1921.

"That thereafter, on 27 June, 1921, the plaintiff, I. G. Green, conveyed by proper deed in fee a portion of said tract of land described in the deed of 20 June, 1921, to his coplaintiff, J. V. Gragg, in pursuance of his agreement and contract.

"That the defendants are in the unlawful and wrongful possession of a part of the land conveyed by the plaintiff I. G. Green to the plaintiff J. V. Gragg (said portion being described by metes and bounds).

"That the plaintiffs are advised, believe and allege the title to the premises described in the foregoing paragraph was conveyed and passed to the plaintiff I. G. Green, and through him to his coplaintiff J. V. Gragg, by the deeds above referred to; that the plaintiffs, and especially

the plaintiff J. V. Gragg, have demanded the possession of the same, and the defendants have wrongfully refused to surrender the same.

"That reasonable rental for the 2 acres and 18 poles is $60."

For a second cause of action, the plaintiffs allege, in part:

"That the defendants, as the plaintiffs are informed, believe and allege, a few days after they had received the full purchase price of the lands referred to and described in the said paper-writing of 11 June, 1921, and the execution of the deed aforesaid, began to assert title to and claimed that portion of said land which is described in the first cause of action, the value of said portion being about one-fourth the value of the entire tract of land, claiming and asserting that they had not conveyed the same to the plaintiff I. G. Green by the said deed to him, although they knew the said Green was paying the full purchase price in reliance upon the fact that the defendants had agreed to convey, and with the belief and understanding that they were conveying to him the said portion of the said tract as well as all of the remainder thereof to which they or any of them had title.

"That defendants, Eliza P. Harshaw, Hal C. Martin and Johnsie Martin, not only by the said paper-writing of 11 June, 1921, but by their conduct and spoken words, represented to the plaintiffs, and to other prospective purchasers with whom J. W. Self, their agent, might enter into negotiations for the sale of the said lands, that they were offering to sell upon the terms stated in said instrument all the right, title and interest that they or each of them had in the said 135-acre tract of land, and in any and every part thereof, and if the plaintiffs had not so believed and relied on said representations they would not have parted with their money, as said defendants well knew.

"That when plaintiffs learned that the defendants, Eliza P. Harshaw, Hal C. Martin and Johnsie Martin, were setting up claim and declaring that they had not conveyed to the plaintiff I. G. Green that portion of said tract described in the first cause of action, they caused to be prepared a deed specifically conveying the same, and requested the defendant Eliza P. Harshaw that she execute, acknowledge and deliver the same to him; that she refused and still refuses to execute the said deed, notwithstanding the contract of 11 June, 1921, to the said J. W. Self.

"Wherefore, plaintiffs pray judgment upon the first cause of action, that the plaintiff J. V. Gragg be declared the owner in fee and entitled to the immediate possession of the 2 acres and 18 poles (described by metes and bounds in the first cause of action); or if, under the court's construction of the deed of 20 June, 1921, the title to the land in question was not conveyed, and did not pass, then upon the second cause of action plaintiffs pray a decree requiring that the defendants, and

more particularly Eliza P. Harshaw, specifically perform the contract of 11 June, 1921, by causing to be conveyed to the plaintiff J. V. Gragg that portion of the said lands, and that the plaintiffs recover their costs, to be taxed by the clerk, and for all other and general relief as may be just and right in the opinion of the court."

The defendant Eliza P. Harshaw, answering, admits signing the option to J. W. Self. Admits signing deed to I. G. Green, "but she denies that she intended to convey or that she did convey any part of the land in controversy in the action," the 2 acres and 18 poles; and answering further, says:

"That she disclaims any right, title or interest in any lands described in the complaint except the 2 acres and 18 poles described in the complaint, and as to that portion she avers she never conveyed the same or any part thereof to any one; neither did she attempt or agree to convey the same to any person whatsoever."

Hal C. Martin and Johnsie Martin answer and say:

"That they disclaim any right, title to, or interest in the lands in controversy."

W. P. Spencer answers and says:

"That he disclaims any right or title to the lands in controversy in this action, and has no interest in the same except that of a renter or tenant of the defendant Eliza P. Harshaw, and now stands ready to surrender whatever possession he has to any person or persons whom the court may adjudge to be the owner of the land in controversy."

The following issues were submitted to the jury and their answers to the same:

"1. Did the defendants, by their contract with J. W. Self, dated 11 June, 1921, authorize the sale of and agree to convey the lands in controversy? Answer: 'Yes.'

"2. Did the defendants, by their deed to plaintiff I. G. Green, dated 20 June, 1921, convey the lands in controversy? Answer: 'No.'

"3. Did defendants, wrongfully and in violation of the said contract, dated 11 June, 1921, fail to convey the lands in controversy? Answer: 'Yes.'

"4. What is the annual rental value of the lands in controversy? Answer: '$60.' "

The court below gave judgment in accordance with the verdict for the 2 acres and 18 poles—being the land conveyed by Jacob N. Harshaw to Eliza P. Harshaw on 11 June, 1906, and order to make title as provided in C. S., 608. The defendant Eliza P. Harshaw excepted and appealed to this Court and assigned errors, which will be considered in the opinion. The other defendants did not appeal.

The other material facts will be set forth in the opinion.

W. A. Self and Laurence Wakefield for plaintiffs.
W. C. Newland, S. J. Ervin, and S. J. Ervin, Jr., for defendant.

CLARKSON, J. The suit in controversy involves 2 acres and 18 poles of land. Moses N. Harshaw and wife, Mary M. Harshaw, on 11 March, 1901, made a deed to their son, Jacob N. Harshaw, for the land in controversy. Jacob N. Harshaw, on 11 June, 1906, deeded the land to Eliza P. Harshaw, his wife, who is the defendant, appellant, in this case. Moses N. Harshaw and wife, Mary M. Harshaw, on 22 December, 1906, conveyed the 135 1-3-acre tract to Jacob N. Harshaw and his children. That the 2 acres and 18 poles was excepted from this conveyance. The gist of this suit: It is claimed that the 2 acres and 18 poles and the 135 1-3 acres were considered one tract, known as the "Harshaw Land," and were sold together. Jacob N. Harshaw is dead and left surviving him his widow, Eliza P. Harshaw, and one child, Johnsie Martin, who married Hal C. Martin. The deed from Eliza P. Harshaw, Hal C. Martin and Johnsie Martin to one of the plaintiffs, I. G. Green, is dated 20 June, 1921, and it is claimed was made in pursuance of the "J. W. Self property contract" set forth in the complaint. The deed states, "Being the land deeded by Moses N. Harshaw and wife, Mary M. Harshaw, to Jacob N. Harshaw, the period of his natural life, and after his death to his children." And describes it as "containing 135 1-3 acres, more or less." There is reserved and excepted from the deed certain lots which were conveyed before by Moses N. Harshaw and wife, Mary M. Harshaw, to other parties; said lots contained in the above boundary and deeds for same being registered in the office of the register of deeds for Caldwell County, N. C., to which deeds and the records thereof reference was made for greater certainty.

The defendant contends: That there were no allegations in the complaint setting out facts sufficient to constitute an action for specific performance. That the action should have been dismissed and a judgment as of nonsuit allowed by the court below. Under our liberal practice, we think the complaint sufficient. The prayer of the plaintiffs asks for specific performance "and for all other and general relief as may be just and right in the opinion of the court."

The issues submitted, the facts adduced on the trial, the contentions set forth by the court on the trial below, all show that the basis of the action was specific performance. The complaint in substance is sufficient.

If the two causes of action in the complaint were not stated definite and certain enough, the defendant could have asked leave of the court

to have this done. The defendant answered. The objector must move in apt time. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. *Barbee v. Davis, ante,* 78, and cases cited.

Article IV, section 1, Constitution of N. C.: "The distinctions between actions and suits shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the fact at issue tried by order of court before a jury."

"Under the former system of practice a party might be turned out of equity, and told to bring his action at law, or be dismissed by one door of the court room, because he had sued in debt or covenant, when he might come back through another door with an action of trespass on the case or replevin or detinue. But now these refinements have been abolished, because not conducive to the administration of justice; and if a party goes into court legally, he will not be turned out to come into court some other way. *Sloan v. R. R.,* 126 N. C., 490. It would be a violation of this section of the Constitution to permit a party to defeat a recovery solely upon the ground of the form of the action." Constitution of N. C., annotated by Connor and Cheshire, p. 147.

Connor, J., in *Pearson v. Millard,* 150 N. C., 311, says: "While, as consistently held by this and all other courts administering equitable rights and remedies, specific performance is not a matter of absolute right, yet it will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice and work no hardship upon the party who has entered into the contract."

"In a suit for specific performance brought by the vendor, the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, but by the facts set out in the pleadings. A prayer for general relief in a bill includes specific performance, where the allegations of the bill are such as to entitle the complainant to that relief. Where plaintiff prays for a money judgment and for such further relief as he may be entitled to, and sets out facts entitling him to specific performance, that relief may be granted, for a prayer for general relief includes a prayer for specific performance." *Councill v. Bailey,* 154 N. C., 54; 11 Enc. Dig. of Reports of N. C., 403.

The defendants, and especially the defendant Eliza P. Harshaw, requested the following instruction: "The first issue submitted to you, gentlemen of the jury, is: Did the defendants, by their contract with J. W. Self, dated 11 June, 1921, authorize the sale of and agree to convey the lands in controversy? The lands in controversy are conceded to be or to consist of the two-acre tract of land described in the deed from Moses N. Harshaw and wife to Jacob N. Harshaw, of date 11 November, 1901 (in record 11 March), and in the deed from Jacob N. Harshaw to the defendant Eliza P. Harshaw, dated 11 June, 1906, and this particular two-acre tract of land is the land in controversy referred to in this issue. Upon the entire evidence in this case the court instructs you that it is your duty to answer this issue 'No.'" The court declined to give this instruction, and the defendants, and especially the defendant Eliza P. Harshaw, excepted.

This calls for the construction of the "property contract," made by the defendants, Eliza P. Harshaw, Hal C. Martin and Johnsie Martin, to J. W. Self, dated 11 June, 1921, as set out in the complaint.

A patent ambiguity cannot be explained by parol, a latent ambiguity can. We think the ambiguity latent and can be explained by parol, and the statute of frauds does not apply.

In *Norton v. Smith,* 179 N. C., 553, the contract was to convey the "entire tract or boundary of land consisting of 146 acres." *Walker, J.,* in that case, goes fully into this matter, and says: "In the subsequent case of *Mead v. Parker,* 115 Mass., 413, where the writing was in these words: 'This is to certify that I, Jonas Parker, have sold to Franklin Parker a house on Church Street for the sum of $5,500,' the Court held that evidence was competent to show what house defendant owned on Church Street; if he had only one, and decreed specific performance of the contract, remarking as follows: 'The most specific and precise description of the property intended requires some proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement.' So it has been held that a description of land, as that on which a certain person resides, is sufficient to identify it by parol evidence. *Morrisey v. Love,* 26 N. C., 38; *Simmons v. Spruill,* 56 N. C., 9; or by its name, as the 'Home Place,' the 'Lynn Place,' or the 'Leonard Greeson Place.' *Smith v. Low,* 24 N. C., 457. These positions are

fully sustained by *Lewis v. Murray,* 177 N. C., 17 at pp. 19-21, citing *Bateman v. Hopkins,* 157 N. C., 470; *Thornburg v. Masten,* 88 N. C., 293; *Farmer v. Batts,* 83 N. C., 387, and other cases. Every valid contract must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence. Fry on Specific Performance, sec. 209; Pomeroy on Contracts, sec. 90, and note; *Buckhorn L. and T. Co. v. Yarbrough, ante,* 335. We have not the slightest doubt that this description is not a patent ambiguity, but, at most, is a latent one, susceptible of being made certain by extrinsic proof. It is far more accurate than some of the descriptions held by the authorities to be sufficiently definite, as against a plea of the statute of frauds, to admit parol evidence for the purpose of fitting the description to the land intended to be conveyed."

We think the court below made no error in admitting parol testimony to fit the description to the land intended to be conveyed.

Another position is taken by the defendant in the brief: "It is clear on the evidence that neither Self nor the defendant believed, or had any reason to believe, that the contract of 11 June included the two-acre lot. This is shown by the fact that Self prepared the deed on 20 June which was tendered to the defendant for execution in compliance with, and in full performance of her prior contract to convey, and she later, some time after the delivery of the deed, informed Self that she had signed a contract to convey the farm, and not a farm and a residence lot. No parol evidence was offered tending to show that the two-acre lot was considered, treated or used with the farm, and as a part thereof, and if such had been permitted, its effect would have been to nullify the statute of frauds."

Although the deed of 20 June, containing 135 1-3 acres, reserved and excepted the lots before conveyed by Moses N. Harshaw and wife, and the two acres and 18 poles had been theretofore conveyed by them, yet it was shown in the evidence that the main dwelling house was on the two acres and 18 poles, and it was included in, considered and treated as a part of the Harshaw land, that is the entire tract 135 1-3 acres.

Both contract and deed were signed by Eliza P. Harshaw, Hal C. Martin and his wife, Johnsie Martin. Eliza P. Harshaw is the mother of Johnsie Martin, and Hal C. Martin is her son-in-law. The contract refers to a piece of land in Collettsville, N. C., about 10 miles from Lenoir. In the contract the land is referred to as a farm, size of lot 135 (acres); 10 acres in cultivation, 10 acres in bottom; on it 2 dwell-

ing-houses, apple trees, peach trees, spring; tract of land known as Harshaw Land. On this farm of 135 1-3 acres that plaintiffs claim was bought were two dwelling-houses, and the 2 acres and 18 poles (defendant claims were reserved) were included in the 10-acre bottom, about the center of the bottom-land. The land was run out, the outside boundaries of the 135 1-3 acres included the 2 acres and 18 poles on which the two dwelling-houses are located. No line of the lot of 2 acres and 18 poles in dispute touches any one of the outer lines of the 135 1-3-acre tract. A tenant cultivated it, and the rents were collected by Eliza P. Harshaw. That the 2 acres and 18 poles and the houses and farm were all treated as one piece of property. It had all been operated together, and the public generally treated it and considered it as a farm, and that part of the 2 acres and 18 poles was treated in conjunction with the farm. The price was such as to include the entire boundary, including the 2 acres and 18 poles. Plaintiffs claim $8,000 was paid for the entire land; that the 2 acres and 18 poles was worth about one-fourth of that amount. The farm could not be utilized without a dwelling-house. The price received by Eliza P. Harshaw was sufficient to show that she had an interest in the farm and this lot, and that it was divided equally, because she got $4,000 for her part.

Practically all these facts appear in the contentions of the plaintiffs given by the court below, which were not objected to. The record shows the contentions were given fairly for both plaintiffs and defendant. Under all the evidence and all the facts and circumstances of this case, the language in the "J. W. Self property contract" of 11 June did not preclude parol evidence. *Norton v. Smith, supra; Buie v. Kennedy,* 164 N. C., 299; *McGee v. Craven,* 106 N. C., 351.

The second issue, "Did the defendants, by their deed to plaintiff I. G. Green, dated 20 June, 1921, convey the lands in controversy?" Under the charge of the court the jury answered "No." The defendants contend, "This deed was executed in performance of her contract," and there is neither allegation in the complaint nor evidence that by reason of either accident, fraud or mutual mistake, anything was included in or omitted from this deed.

From the position taken by the court in this case parol evidence is permitted, on account of the latent ambiguity, to show that the "J. W. Self property contract" included the 2 acres and 18 poles. The deed of 20 June, 1921, did not convey this land—2 acres and 18 poles. This suit is not brought to set aside that deed for accident, fraud, or mutual mistake. That deed is good as far as it goes, but this action is for specific performance of the original "J. W. Self property contract." This suit is against the defendant to perform the entire contract, which included the 2 acres and 18 poles.

The defendant also assigned as error: "The ruling of the court declining to instruct the jury, as prayed by defendants, substantially to the effect that there was no evidence that Hal C. Martin was the agent of Mrs. Eliza P. Harshaw or that he entered into any contract as her agent with J. W. Self for the sale of the lands in controversy, or that she subsequently ratified any contract therefor entered into in her behalf by the said Martin with the said Self, and that the conversation between Self and the said Martin in regard to the matter was not competent evidence against Mrs. Eliza P. Harshaw."

It appeared in evidence that Eliza P. Harshaw stated she wanted to sell all the land—the Harshaw Land. It appeared in evidence that she only had a dower interest in the land other than the 2 acres and 18 poles. That the land brought $8,000. The 2 acres and 18 poles was worth about $2,000. She received one-half of the money, $4,000, from J. W. Self. That her dower interest in the one-third cash value (if the contract did not include the 2 acres and 18 poles) would not perhaps be half of that amount—showing that she was selling the entire tract of land; that Hal C. Martin made the contract; Eliza P. Harshaw, he and his wife all three signed the "J. W. Self property contract"—all acting together. All this evidence was to show that Martin was her agent, and she ratified the contract Martin made with Self, and it was made on her behalf as well as for his wife, Johnsie Martin. It was evidence sufficient for the jury to pass on whether he was her agent, or she ratified his act. *Anderson v. Corporation,* 155 N. C., 135.

The court charged: "The court further instructs you that the conversation between Self and Martin in regard to the matter is not competent evidence against Mrs. Eliza P. Harshaw, unless you find that she ratified it." This charge was favorable to defendant.

On the third issue, "Did the defendants wrongfully and in violation of the said contract dated 11 June, 1921, fail to convey the lands in controversy?" The court charged the jury in regard to this issue: "Now the burden of proof is on the plaintiffs to satisfy you of the fact by the greater weight of the testimony as to the first issue. The plaintiffs contend, gentlemen of the jury, that although the second issue may be decided against them, that is, that the deed did not convey the two acres, yet from the evidence offered it was the intention of the parties to convey it, and that it ought to be conveyed, and that this was wrongful, in violation of the contract; that is, it was wrongful in that it did not convey it and refused to convey it."

After stating the contentions of the parties, the court charged: "The court instructs you that it is not the understanding of any party to a contract as to its terms or its meaning which settles a dispute. A

contract must speak for itself, and while parol evidence may be competent to explain a contract, parol evidence is not competent in this case either to contradict, vary or add to the terms of a written contract, except where it is vague, uncertain or ambiguous, then parol evidence is offered for the purpose of explaining the uncertain or vague or indefinite part of it. You, however, have a right, and it is your duty, to refer to all the deeds and contracts in order to ascertain whether this 2-acre tract on 11 June, 1921, was or was not a part of the Harshaw farm or included in the contract."

We think this charge of the court below correct under the facts and circumstances of this case. It appears from the record that the court gave the contentions of plaintiffs and defendants on the issues minutely and carefully, and the law bearing on the facts. The whole matter was left to the jury, and they have answered the issues against the defendant.

We have examined the entire record and briefs, the exceptions to the issues submitted, the prayers for instruction and, also, cases cited, with care, and can find no prejudicial or reversible error.

No error.

CHARLES W. BELL v. W. A. DANZER, TROY I. HERRING, C. A. TRANTUM, ROBERT M. RUPP, WHITE LAKE LUMBER COMPANY, J. SCOTT BELL, S. EARL BELL, AND BELL LUMBER COMPANY.

(Filed 20 February, 1924.)

1. Contracts—Breach—Damages—Corporations — Shares of Stock — Unlawful Motive.

While the facts in the instant case do not involve approval of the broad doctrine that if a person has the lawful right to do a thing the act remains essentially lawful when done under any conceivable motive, upon the facts disclosed *it is held* that the exercise of the right complained of, which does not infringe the legal right of another, is not actionable, even if prompted by an evil motive.

2. Same—Interest.

Where the defendants have breached their contract to purchase plaintiff's shares of stock in a corporation, interest will begin to run from the date of the contract when the plaintiff was then ready to deliver it.

APPEAL by plaintiff from *Calvert, J.*, at March Term, 1923, of SAMPSON.

The facts pertinent to the points involved in the appeal are as herein set out:

The action was brought by Chas. W. Bell against William A. Danzer, Cleveland A. Trantum, Robert M. Rupp, and Troy I. Herring for the recovery of $17,500, with interest thereon from 16 March, 1918, representing the par value of $17,500 of a $25,000 issue to Chas. W. Bell of the capital stock of the White Lake Lumber Company (a proposed corporation), which the defendants had contracted and agreed to purchase from the said Chas. W. Bell under the provisions of a certain contract and agreement entered into between the plaintiff and said defendants, dated 16 March, 1918, and referred to in the complaint and the entire evidence in the case as Exhibit A.

The defendants denied liability and pleaded that they had already performed the obligation of the contract, Exhibit A, and further alleged that said stock which the plaintiff, Chas. W. Bell, was seeking to force the defendants to purchase was in fact the property of the Bell Lumber Company and not the property of Chas. W. Bell, and that because of certain fraud practiced by the said Bell Lumber Company in the sale of its timber holdings to the defendants, promoters of the White Lake Lumber Company, to whom deed was afterwards actually made by the Bell Lumber Company, and on account of the loss of the title to certain of the tracts of timber sold because of the failure of the Bell Lumber Company to keep the same alive by payment of the extension moneys, which covenant on the part of the Bell Lumber Company was guaranteed by the plaintiff, Chas. W. Bell; and that by reason of certain wrongful acts whereby the value of the stock was depreciated, the plaintiff was not entitled to recover anything. On 8 March, 1921, and prior to answer filed by the defendants to the original action, the defendants Danzer and Herring filed a petition, wherein they alleged that the White Lake Lumber Company was the beneficiary under the contract, Exhibit A, and that all the things required of said contract to be done and performed by the plaintiff had not been done and performed, and that thereby the White Lake Lumber Company had suffered damages, and that the said White Lake Lumber Company was a necessary party to the suit.

An order was made allowing the White Lake Lumber Company to be made a party defendant, and also at May Term, 1922, an order was made making the Bell Lumber Company and J. Scott Bell and S. Earle Bell parties. On 15 August, 1922, the White Lake Lumber Company filed its cross-bill and complaint against Chas. W. Bell, S. Earle Bell, J. Scott Bell, and the Bell Lumber Company. The complaint alleges several items of damages as follows:

(*a*) That the Bell Lumber Company had breached the contract, Exhibit A, in that it had failed to keep alive the title to various tracts of

the timber sold by paying the annual extensions provided for in the deeds of conveyance, which covenant on the part of the Bell Lumber Company the said S. Earle Bell and Chas. W. Bell had guaranteed, and that by reason thereof the title to various tracts had been lost and the said White Lake Lumber Company has suffered damage to the extent of $15,000.

(*b*) That the said Bell Lumber Company, Chas. W. Bell, J. Scott Bell, and Earle Bell had fraudulently represented to the original defendants, promoters of the White Lake Lumber Company, and also to said company, that the timber holdings of the Bell Lumber Company, constituting the Turnbull Group, was a reasonably compact body of timber and that the tracts thereof adjoined and were contiguous, and that the rights and easements necessary in cutting and removing the same extended from tract to tract so that no difficulty would be experienced in extending a tram road from tract to tract; that these representations were false; and that after the institution of the original action the said Chas. W. Bell, acting for himself, the Bell Lumber Company, J. Scott Bell, and S. Earle Bell, for the purpose of hindering, delaying, defeating and blocking the operations of the White Lake Lumber Company, bought and secured in the name of the said Chas. W. Bell and his relations, and found title to such tracts of timber in the Turnbull Group as were most necessary and desirable to the operations of the White Lake Lumber Company, including certain rights-of-way leases, and that by reason of said conduct the operations of the White Lake Lumber Company had been seriously impeded and interfered with, and that said company thereby had been forced to expend large sums of money in buying rights of way and other timber necessary to connect up said Turnbull Group, and its mill had been forced to close down on account of the inability to get logs; that it had lost the title to certain other timber owned by it but not bought from the Bell Lumber Company, all of which damages were placed at $17,500, thus making a total of $42,500 which the White Lake Lumber Company sought to recover of the Bell Lumber Company, S. Earle Bell, J. Scott Bell, and Charles W. Bell.

The Bell Lumber Company, Chas. W. Bell, S. Earle Bell, and J. Scott Bell filed an answer to the cross-bill of the White Lake Lumber Company, in which they denied that there had been any fraud practiced in the original negotiations and sale by the Bell Lumber Company of its timber holdings to the original defendants, promoters of the White Lake Lumber Company, or to said company, but that the said original defendants, promoters, made a full investigation of the timber which the said Bell Lumber Company was selling before the

contract, Exhibit A, was entered into, and it was thoroughly understood by both sides that the said Turnbull Group, as well as the Colly Group, was not a connected body of contiguous tracts of timber.

The answer to cross-bill further alleged that the obligation on the part of the original defendants, Danzer, Trantum, Rupp and Herring, was a personal covenant on their part to purchase the $25,000 capital stock of Chas. W. Bell in the White Lake Lumber Company, and was in no way dependent upon the covenant of the Bell Lumber Company to secure the extensions of time and assurances of title called for in said contract, Exhibit A, and the deed executed pursuant thereto. Said answer further denied that the White Lake Lumber Company had lost title to any of the timber conveyed or contracted to be conveyed.

Chas. W. Bell admitted that after the defendants Danzer, Herring, Trantum, and Rupp had refused to purchase and pay for his stock, and after the institution of his original action, that he reëntered the territory in which the timber sold by the Bell Lumber Company to the White Lake Lumber Company was located and purchased timber, timber rights, etc., as he had the right to do, but that in so doing he was not animated by any ill-will or ill feeling towards the White Lake Lumber Company or its promoters, and not for the purpose of hindering and blocking the said White Lake Lumber Company in its operations, but with the title to said tracts the said Chas. W. Bell thought that he would be better enabled to negotiate a satisfactory adjustment of the matters between himself and the original defendants. The other respondents, Bell Lumber Company, J. Scott Bell and S. Earle Bell, denied connection with the activities of said Chas. W. Bell in said territory after the institution of his suit, and it is alleged that the said Chas. W. Bell himself tendered the White Lake Lumber Company title to all of his holdings in said territory at actual cost plus interest from date of purchase, which he alleged was the reasonable value of said property. All other allegations of the cross-bill and damages alleged were denied.

At August Term, 1922, by a consent order, the cause was referred, and the referees heard said cause in full and filed their report 8 January, 1923.

Chas. W. Bell filed exceptions to the report as did also the White Lake Lumber Company and the defendants Trantum, Rupp, Danzer, and Herring; and said cause came on for hearing before his Honor, Judge Calvert, at March Term, 1923, of the Superior Court of Sampson County, upon the exceptions. After full hearing his Honor allowed the White Lake Lumber Company to amend its cross-bill so as to allege that the action of Chas. W. Bell was malicious. His Honor adopted

the findings of fact of the referees with certain modifications and made the following additional findings:

1. That there were no false or fraudulent representations made or fraud practiced by the Bell Lumber Company, or its officers or agents, to Troy I. Herring, W. A. Danzer, Robert M. Rupp or C. A. Trantum, promoters of the White Lake Lumber Company, in the negotiation, sale and conveyance by the Bell Lumber Company to said parties and the White Lake Lumber Company of the timber, timber rights, etc., covered by the deed executed pursuant to the contract of 18 March, 1918, marked Exhibit A.

2. That the $25,000 capital stock issued to Chas. W. Bell is and was the $25,000 capital stock which the defendants Trantum, Rupp, Danzer and Herring agreed to purchase under the terms of said contract, Exhibit A.

3. That the acts of Chas. W. Bell, as set out in the ninth finding of fact by the referees, were done wilfully and maliciously.

4. At the time Chas. W. Bell was doing the things and committing the acts referred to in the ninth finding of fact by the referees, he had not himself complied with that portion of the contract, Exhibit A, in which he guaranteed personally and individually to pay the annual extension moneys from year to year. On account of this failure, title to some of the tracts of timber had lapsed and the titles to other tracts were endangered. As early as August, 1919, W. A. Danzer and his associates notified Chas. W. Bell of this situation and demanded of him strict performance of this portion of the contract; but Bell did the things and committed the acts set out in the ninth finding of fact by the referees before complying with the provisions of the contract with reference to the extensions and other assurances of title, and did not comply with said provisions of the contract until August, 1922.

5. Except as herein modified, all exceptions to the findings of fact by the referees are hereby overruled, and such findings are approved and adopted by the court as its own.

The material part of the judgment follows: It is considered and adjudged:

1. That the plaintiff, Chas. W. Bell, have and recover of the defendants, C. A. Trantum, W. A. Danzer, Robert M. Rupp, and Troy I. Herring, the sum of $17,500, with interest thereon from 1 August, 1922, until paid.

2. That the White Lake Lumber Company have and recover of Chas. W. Bell the sum of $5,000, with interest thereon from the first day of March Term, 1923, of Sampson Superior Court.

3. That the White Lake Lumber Company have and recover nothing from the Bell Lumber Company, J. Scott Bell, and S. Earle Bell,

and that said defendants go without day and recover their costs of the White Lake Lumber Company.

The date of the contract is 16 March, 1918; the date of the deed to the White Lake Lumber Company is 6 August, 1918.

There are two assignments of error:

1. That his Honor erred in allowing recovery of $5,000 damages in favor of the White Lake Lumber Company against Chas. W. Bell.

2. That his Honor erred in failing to allow interest on the recovery of $17,500 from 16 March, 1918, the date of the contract, Exhibit A.

A. McL. Graham and L. D. Lide for the plaintiff.

J. Bayard Clark and Butler & Herring for the defendants.

ADAMS, J. After he had demanded the repurchase of his stock and had instituted this action, but before the Bell Lumber Company had procured an extension of time for the cutting and removal of the timber, the plaintiff purchased leases, easements, and timber on other tracts of land over which the defendants wanted rights of way, and thereby caused the defendants to buy additional timber and rights of way at a price in excess of their market value; to build additional tracks; to replace others, and from time to time to shut down their mills. (Ninth finding of facts.)

The defendants admitted that the plaintiff had a legal right to acquire the timber and easements for a lawful purpose, but contended that his purpose was unlawful; that he had guaranteed performance of the Bell Company's covenant to get an extension of time within which the defendants might cut the timber; that neither he nor the company had procured such extension; and that he sought by unlawful means, while declining to respect his own contract, to make the defendants comply with theirs.

The plaintiff's specific or primary object was to compel Danzer and his associates to pay for his stock, and to this end he attempted to hinder and delay the White Lake Company, in which they were interested, by making the purchase referred to. This purchase in itself was not unlawful. The question is whether it was made so by the taint of wilfulness and malice, or, stated in general terms, whether a lawful act becomes unlawful when actuated by a malicious motive. The words "wilfully and maliciously," as used in the judgment, evidently import a bad motive, an act done with intent to injure, or an act which without regard to motive would not have amounted to a civil wrong.

In *Keeble v. Hickeringill,* 103 Eng. Rep., 1127 (11 East, 574), one of the oldest cases on the subject, *Holt, C. J.,* made this broad state-

ment: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." But in *Allen v. Flood,* 17 Eng. Rul. Cas., 320, *Lord Watson* said: "Assuming, what to my mind is by no means clear, that *Keeble v. Hickeringill* was meant to decide that an evil motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognized in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the Court professed that they were guided by the reasoning of *Holt, C. J.* That instance is to be found in *Carrington v. Taylor,* 11 East, 571 (11 R. R., 270), a decision which I venture to think that no English Court would at this day care to repeat. . . . To my mind the case is of considerable importance, because it shows that in the year 1809 the Court of Queen's Bench did not regard *Keeble v. Hickeringill* as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action." And further: "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of the law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy."

In this country the decisions in which the question has been discussed are not uniform. Variety of opinion appears, not only in tribunals of different jurisdictions, but not infrequently among judges of the same court. In some instances this diversity of opinion no doubt grew out of the distinction between cases in which the defendant, although impelled by a bad motive, exercised his own rights without interfering with the legal rights of the plaintiff and cases in which a

legal right of the plaintiff was infringed, and in other instances it perhaps came from a failure to observe the distinction between the exercise of absolute rights and the exercise of rights which are qualified or relative. But with comparatively few exceptions the American cases hold that the exercise of a right which does not infringe the legal right of another is not actionable even when prompted by malice, or that the motive is immaterial if the defendant's act was otherwise lawful. That this principle has been variously expressed will be made to appear by reference to a few excerpts. "An act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful." *Guethler v. Altman,* 84 A. S. R. (Ind. App.), 313. "If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful." *Bohn Man. Co. v. Hollis,* 40 A. S. R. (Minn.), 319, 323. "The exercise by one man of a legal right cannot be made a legal wrong to another." Cooley on Torts, 685.

The facts in the instant case do not involve approval of the broad doctrine that if a person has the lawful right to do a thing the act remains essentially lawful when committed under any conceivable motive, because in the present case the plaintiff's specific or primary purpose was not to injure the defendants, but to benefit himself. *Tuttle v. Buck,* 16 Ann. Cas. (Minn.), 807, and note; *Lancaster v. Hamburger,* 1 Ann. Cas., 248; *Tennessee Coal Co. v. Kelly,* 163 Ala., 348; *Union Labor Hospital Assn. v. Vance Lumber Co.,* 33 L. R. A. (N. S.), 1034; note to *Gray v. Building Trades Council,* 103 A. S. R., p. 499; note to *Globe Ins. Co. v. Fireman's Ins. Co.,* 29 L. R. A., 673, and note; *Haywood v. Tillson,* 46 A. R. (Me.), 373; *Oglesby v. Attrill,* 105 U. S., 605; 26 Law. Ed., 1186.

Our own decisions are in accord with this doctrine. In *Richardson v. R. R.,* 126 N. C., 100, the Court held that malice disconnected with the infringement of a legal right cannot be the subject of an action. The same conclusion was reached in *S. v. Van Pelt,* 136 N. C., 634, in which numerous authorities were cited, and again in *Biggers v. Matthews,* 147 N. C., 300, in which *Haskins v. Royster,* 70 N. C., 601, and *Jones v. Stanly,* 76 N. C., 355, were distinguished. *Barger v. Barringer,* 151 N. C., 433, was decided on the principle that a person should not be permitted to use his property for the malicious purpose of injuring his neighbor when no benefit accrues to himself; and the plaintiff's recovery was allowed on the ground that he had been injured by the defendant's erection of a private nuisance. That decision is not

in conflict with the doctrine maintained in the other cases cited, as a perusal of the opinion will show; for it is there expressly said, "We see no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way, with no other purpose than to damage his neighbor."

By applying the doctrine set forth in the foregoing decisions to the facts appearing in the instant case we are convinced that the defendants cannot maintain an action against the plaintiff to recover damages resulting from his purchase of the timber and easements. He had the legal right to make the purchase, and if in the exercise of such right he maliciously attempted incidentally to hinder and delay the work of the White Lake Lumber Company, he nevertheless intended primarily to benefit himself by compelling Danzer and his associates to perform their contract by paying the remainder due for the plaintiff's stock.

The second assignment of error is his Honor's failure to allow interest from 16 March 1918 (the date of the contract), on the amount recovered by the plaintiff. The allowance of interest from 1 August, 1922, was based on the finding that the plaintiff did not comply with his contract until that time. Unless the general rule is modified by this finding, interest should be allowed from the date of the contract. C. S., 2309, 2998; *Chatham v. Realty Co.,* 174 N. C., 671; *Bond v. Cotton Mills,* 166 N. C., 20.

In our opinion the facts do not modify the general rule. True, the Bell Lumber Company contracted to sell its property to the proposed incorporators or to any proposed incorporation of whatever name, and several months later made a conveyance thereof to the White Lake Lumber Company. The original agreement to pay the extension money was then merged or incorporated in the conveyance. Certainly after the execution of this deed there were two independent contracts; the plaintiff had contracted with the White Lake Lumber Company to pay the extension money and Danzer and his associates had contracted to buy the plaintiff's stock. Their failure to pay for the stock in accordance with their contract cannot be justified on the ground that the plaintiff had committed a breach of his contract with the White Lake Lumber Company. Neither the delay of the Bell Lumber Company to pay the "extension money" nor the plaintiff's failure to do so constituted a breach of the plaintiff's contract with those who had agreed to buy his stock. He was ready to deliver the stock and it was the duty of the purchasers to make payment; and on account of their refusal to do so, the plaintiff is entitled to interest from the date of the contract.

In this connection it may be noted that before the hearing the "extension money" was paid up to and including the month of August, 1922.

The judgment is modified by allowing interest on the plaintiff's recovery from the date of the contract, and by vacating and setting aside the judgment recovered against the plaintiff by the White Lake Lumber Company for $5,000 and interest, and as thus modified it is affirmed.

Modified and affirmed.

MANUFACTURERS FINANCE COMPANY AND SUPERIOR MOTOR TRUCK COMPANY v. AMAZON COTTON MILLS COMPANY AND R. E. ZIMMERMAN.

(Filed 20 February, 1924.)

1. Evidence—Questions for Jury—Trials.

Where there is more than a scintilla of evidence to support plaintiff's claim, an issue of fact is presented which is for the jury to determine and not a matter of law for the court.

2. Banks and Banking—Principal and Agent—Bills and Notes—Negotiable Instruments—Holder in Due Course—Agency for Collection.

A bank is an agency for collection and not a purchaser in due course when it discounts its depositor's negotiable paper under an arrangement with him to charge it back to his account if the maker fails or refuses to pay it, and this condition may be implied from the course of dealings between them.

3. Same—Evidence—Questions for Jury—Trials.

While a bank purchasing a negotiable instrument before maturity and for value, *prima facie* takes the paper free from any infirmity in the instrument (C. S., 3032, 3033), it may be shown to the contrary that there was an arrangement between the bank and its depositor that the former had acquired the paper under an arrangement to charge it back to its depositor in the event of nonpayment by the maker; and where the testimony is conflicting, an issue of fact is presented for the jury to determine as to whether the bank was a holder in due course or merely an agency for collection.

4. Same.

Evidence in this case of certain written agreements between the bank and its depositor to the effect that the bank should collect the papers of its depositor that it had discounted, providing for the expense, etc., *is held* sufficient evidence to take the issue of fact to the jury for their determination of the question whether the bank was a holder of the negotiable instrument for value, in due course, as a purchaser before maturity, or was only an agency for collection.

5. Same—Mortgages—Liens—Waiver.

Where there is evidence that a finance corporation had accepted from its depositor, a concern manufacturing motor trucks, a certain negotiable instrument in a series of transactions as an agency for collection, together with a prior registered contract of the manufacturer retaining title to the auto truck, and there was also evidence that the truck in question had been sold to the manufacturer's sales agent within a certain territory who had, with the knowledge and consent of the officers of the manufacturing concern, sold it to the defendant under a general authority with the manufacturer, who received the benefits of the transaction: *Held*, the question was for the determination of the jury as to whether the manufacturer had waived its right of lien, and parol evidence of the manufacturer's ratification through its proper officers does not fall within the statute of frauds, and is admissible.

APPEAL by defendant Mills Company from *Stack, J.*, at May Term, 1923, of DAVIDSON.

Civil action. The Manufacturers Finance Company, hereinafter called Finance Company; Superior Motor Truck Company, called Truck Company; Amazon Cotton Mills Company, called Mills Company.

The plaintiff Finance Company is a corporation of Baltimore, Md., engaged in the business of commercial banking, and deals largely in commercial paper. The Truck Company were manufacturers of motor trucks in Atlanta, Ga. The defendant R. E. Zimmerman, in the year 1920, was engaged in the business of selling motor trucks and motor vehicles at Thomasville, N. C.

The Truck Company on 2 August, 1919, made what was termed a "Dealers' Agreement," also another claimed as "Agents' Agreement" under Exhibit "D" duplicate, with R. E. Zimmerman, in which he had the exclusive right to sell their trucks in Davidson County and other counties in the vicinity. This agreement expired by limitation on 1 September, 1920. Also agreement between same parties dated 11 March, 1918. R. E. Zimmerman, under his contracts, purchased a certain motor truck, No. 2529, from the Truck Company, on or about 17 April, 1920, and gave a note for same, the motor company retaining title to secure the note; the title contract was duly recorded in the office of the register of deeds for Davidson County, N. C., where Zimmerman lived, and before the sale of the truck to the defendant Mills Company. (The registration was held sufficient in *Finance Co. v. Cotton Mills Co.*, 182 N. C., 408.) Zimmerman made a promissory note dated 17 April, 1920, in the sum of $1,320, with interest from date, being the deferred payment on the truck, the title to the truck being retained by the motor company to secure the note. The truck was delivered to R. E. Zimmerman. The defendant Mills Company, on or about 12 May, 1920, before the Zimmerman note was

due, purchased the motor truck from R. E. Zimmerman for the sum of $3,390, paying cash $1,700, and giving in exchange a one-ton Superior Motor Truck purchased from R. E. Zimmerman, valued at $1,690. The Mills Company claimed it had no notice (except what the law established by record) of the recorded lien on the truck, and it paid full value for the truck. It further claimed that R. E. Zimmerman, in the sale of the motor truck and in collection of the purchase price therefor, acted as agent for the Superior Motor Truck Company, and its answer as a defense to plaintiff's action says: "That, as this defendant is informed and believes, R. E. Zimmerman has been acting and dealing in motor trucks as agent for the plaintiff Truck Company for more than a year past, and has been during said time the exclusive agency and dealer in said Superior Motor trucks in the county of Davidson and many other counties in the State of North Carolina, and has largely advertised as such agent, and sold many trucks, as was well known to and approved by the said Truck Company, which company furnished blanks for orders, and also other blanks and advertising matter. That the said motor company has at all times past well known and approved the way and manner in which its said agent, R. E. Zimmerman, conducted the said business, and that he sold trucks, some for cash and some on time, and collected the purchase price, and took notes for the balance due, and that he took notes in his own name and discounted them at the banks and received the money therefor; and defendant is further informed and believes that R. E. Zimmerman would turn over the money received from the sale of the said trucks to said Truck Company, which took the same, and that in this way said Truck Company has received the money paid by the defendant, and the same should be applied to any charge or account the said Truck Company may have against said R. E. Zimmerman by reason of said motor truck purchased by the defendant."

The defendant Mills Company denied that the Truck Company in due course endorsed the note in blank and sold same to plaintiff Finance Company, and the note is the property of the Finance Company.

The plaintiff Finance Company sued on the note and contract, retaining title made by R. E. Zimmerman to the Truck Company for $1,320, dated 17 April, 1920, and transferred to it by the Truck Company, and brought claim and delivery proceedings for the truck against the defendant Mills Company, and the Mills Company replevied the same.

During the trial the Truck Company took a nonsuit.

There were several issues submitted to the jury but the only one material for the consideration of this case is the third, which is as follows: "Did the Manufacturers Finance Company purchase said note

and contract, retaining title to the motor truck herein sued for, from the Superior Motor Truck Company for value and before maturity, in good faith and in due course of business, without notice of the claim or equity of the Amazon Cotton Mills Company, as alleged in the complaint?"

The court below gave the following instruction relating to this issue: "The court further charges that whenever a note is endorsed to another before due, the law presumes he got it in due course, and took it freed from any equities in behalf of the defendant. The law presumes that the holder of a note endorsed in blank is its holder in due course; that he took it for value before maturity, and without notice of any equity, and that he is the owner and has the right to bring suit to enforce collection. Every holder is deemed a holder in due course, and upon the execution of the instrument being proven, every holder is deemed *prima facie* a holder in due course. Such *prima facie* evidence is not rebutted in the answer of the defendant denying the ownership of the plaintiff. (Now the plaintiff, having introduced evidence showing that it is a holder in due course and without notice, then the burden would be upon the defendant in this case to satisfy you by the greater weight of the evidence that the plaintiff did take it with notice or that it was not a holder in due course under the law, and the court charges you there is no evidence on the part of the defendant upon which you can answer that issue 'No.' Gentlemen of the jury, now, if you believe by the greater weight of the evidence, or if you believe the evidence in the case, the entire evidence in the case, you will answer the third issue 'Yes.')" The jury answered the issue "Yes."

The defendant excepted to the latter part of this charge, beginning with "Now the plaintiff" and ending with "Yes," and assigned as error that part of the charge.

There were other exceptions and assignments of error—23 in all—to the exclusion of evidence, prayers for special instruction and errors in the charge. We will consider them all under the court's charge to the jury on the third issue. Judgment was rendered in favor of the plaintiff, and defendant Mills Company duly excepted, made the usual assignments of error, and appealed to this Court.

The other material facts will be set forth in the opinion.

Brooks, Parker & Smith for plaintiff.
H. R. Kyser and Raper & Raper for defendant.

CLARKSON, J. C. S., 3032. "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument."

C. S., 3033. "A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That the instrument is complete and regular upon its face.

(2) That he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact.

(3) That he took it for good faith and value.

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The plaintiff Finance Company claims it is the holder of the note and title retaining contract of R. E. Zimmerman in due course; that the note is complete and regular on its face, and that it became the holder before it was overdue; that it took the note and title retaining contract for good faith and value; that at the time it took the note it had no notice of any infirmity or defect in the title of the Truck Company negotiating it; that there was no error in the charge of the court below on the third issue, and the judgment should be sustained.

The defendant Mills Company, on the contrary, says that the Finance Company is not a *bona fide* holder of the note for value, before maturity and in due course; that the note in the possession of the Finance Company is subject to all equities and defenses existing between it and Zimmerman, who was an agent of the Truck Company; that the Finance Company dealing with the Truck Company was not a purchaser, but an agent for collection. These are the contentions. Is there any evidence to support the position of the Mills Company?

In *Hancock v. Southgate,* 186 N. C., 282, the Court said: "Where there is any evidence to support plaintiff's claim, it is the duty of a judge to submit it to the jury, and the weight of such evidence is for the jury to determine."

In *Temple v. LaBerge,* 184 N. C., 254, the principle applicable is stated as follows: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection and not a purchaser. *Packing Co. v. Davis,* 118 N. C., 548; *Cotton Mills v. Weil,* 129 N. C., 452; *Davis v. Lumber Co.,* 130 N. C., 176, and *Bank v. Exum,* 163 N. C., 202. *Worth v. Feed Co.,* 172 N. C., 342."

The fact that the officers of the Finance Company testified that its company is the owner of the note, and they purchased it in due course *bona fide* for value and before maturity, is not conclusive if the Mills

Company should show by facts and circumstances to the contrary. The weight of the evidence, pro and con, was for the jury. What are some of the facts and circumstances relied on by the Mills Company?

Exhibit "F," agreement between Truck Company and Finance Company of 1 April, 1920:

(1) That the Truck Company here undertakes to perform and desires to sell to the Finance Company accounts receivable, notes, leases, mortgages, contracts, and choses in action, hereinafter designated "accounts," evidencing sales and deliveries of personal property.

(2) That the Truck Company will not sell or assign any of its accounts elsewhere without first giving ten days written notice to Finance Company of such intentions.

For the "accounts" the Finance Company is to pay 10 per cent of actual net amounts thereof less charge equal to the legal rate of interest on the purchase-money outstanding during the period it is outstanding; also charge 1-30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by until paid to Finance Company, plus $5 per $1,000 on the first $100,000 of accounts purchased within any twelve successive months period. Subject to an additional charge of 1-5 of 1 per cent on the face of all accounts purchased. Ninety per cent of the actual net amount thereof shall be paid in cash upon acceptance of such accounts of the Truck Company. Ten per cent is held back and thereafter applied to the payment of any accounts that are in any manner affected by any breach or violation of any warranty of the Truck Company.

The second article of the said contract, in part, provides: "In order to avoid objections by, and any possible loss of trade from any of its customers through the Finance Company collecting the said accounts direct from the debtors, and to obtain from the Finance Company the right and privilege which is hereby given to make collections at the office of the Truck Company of all accounts sold to the Finance Company, the Truck Company will pay the Finance Company for the salaries and all expenses of travel of auditors of the Finance Company who shall have the right to call every thirty days or oftener and inspect, audit, check and make extracts from the books, accounts, records, orders, original correspondence and other papers of the Truck Company relating to accounts sold hereunder, as provided in the bond hereinafter referred to, or as required and directed by the Finance Company."

There is also this provision in the contract: "Should the debtor named in such account fail or refuse to receive, accept or retain or return the property evidenced by such account, or should said property be rerouted or reconsigned, then the title to said property or property exchanged therefor, with the right to sell or otherwise dispose thereof,

and the title to any new account created through the resale thereof, shall be and remain in the Finance Company."

Exhibit "G" is headed: Original Certificate Cr. 235752—page .....

Showing reserve 10 per cent taken out.

E. M. Willingham gave an individual "Guaranty and Waiver" bond. The Truck Company also gave a $50,000 surety bond, signed by E. G. Deckner, to the Finance Company.

All this and other matters of the dealings between the Finance Company and the Truck Company was more than a scintilla of evidence to go to the jury, its weight is for them to determine on this aspect of the case whether the bank is an agent for collection and not a holder or purchaser in due course.

The next proposition, under contract Exhibit "F," it provides: "And to obtain from Finance Company *the right and privilege which is hereby given* (italics ours), to make collections at the office of the Truck Company of all accounts sold to the Finance Company."

If the Truck Company had the right to make the collection from R. E. Zimmerman of the note and retaining title contract, was Zimmerman a dealer, or was there any evidence that he was the Truck Company's agent in this matter? Was the sale to the defendant Mills Company ratified by the Truck Company? These matters are for a jury to determine under proper instructions in the court below on the hearing.

On this phase of the case, the Mills Company contends: The Truck Company and R. E. Zimmerman had written agreement between them regarding the handling of trucks. The agreement in force at the time, Exhibit "C" and Exhibit "D," which are the same except in the copy describing the territory in which Zimmerman operated there is this clause (Exhibit "C"): "And in any open territory in North Carolina until same is closed with other dealers." Exhibit "D" is the same except in lieu of the words quoted there are these words: "And any other open territory in North Carolina until same is closed by manufacturer to another agent."

The court below ruled out the testimony of J. A. Elliott as to the sign in the store and roads "Agent Superior Motor Trucks."

The court below ruled out the evidence offered as to the sign in the place of business of R. E. Zimmerman having on it "R. E. Zimmerman, Agent of Superior Motor Trucks." Also the evidence that E. M. Willingham, who was president of the Truck Company, sent the sign that was placed in the place of business; also like signs posted along the public highways leading into Thomasville. Also the testimony of R. E. Zimmerman that Willingham visited Thomasville and knew and authorized the sign to be put up and gave him authority to sell the trucks. In Exhibit "D" the words "another agent" are used.

As to the authority of Willingham and Deckner to bind the Truck Company, Exhibit "E" is signed, "Superior Motor Truck Company, by E. M. Willingham, Prest. Attest: E. G. Deckner, Secty." The evidence, if believed, from the record shows that the declarations of these officials were made in line of their official duty. *Beck v. Wilkins-Ricks Co.,* 186 N. C., 213, and cases cited.

We think the evidence ruled out and excepted to in the court below competent, from the view we take of this case.

The competency of the testimony of the officials of the motor company, in the instant case, does not conflict with what was said in *Bank v. Mfg. Co.,* 186 N. C., 744.

In the agreement, Exhibit "E," this language is used: "Should the party (R. E. Zimmerman) of the first part sell the truck on which there is an outstanding note in favor of the party of the second part (Superior Motor Truck Company), immediately upon the sale of said truck he will take up said outstanding note." Although this agreement is dated 11 March, 1918, it is a circumstance, under the facts in this case, to go to the jury, to corroborate R. E. Zimmerman. R. E. Zimmerman testified: "Mr. Willingham (president of the company) and Mr. Deckner (secretary and treasurer of the company) gave me permission to sell all the trucks. Mr. Deckner was in my office at the time the sale of this particular truck was made. Mr. Deckner suggested that I take up the note that was due previous to the note sued on. He was present when the sale was made and knew I got the check, and saw it. This is the check that I showed Mr. Deckner.

"By the Court: What is the date of that? A. 12 May, 1920.

"By the Court: What is the date of this instrument (Exhibit B)?

"By Mr. Smith: The note and contract of conditional sale are dated 17 April, 1920, and the certificate of indebtedness transferring it to the Finance Company, 22 April, 1920.

"Defendant offered in evidence check dated 12 May, 1920—$1,700."

This testimony was excluded and exception taken in court below. We think this was error.

The testimony of Miss Haynes, whose evidence was excluded, was to this effect: "In May, 1920, I was employed by R. E. Zimmerman, doing stenographic work. I know E. G. Deckner. I met him in office. He remained at Thomasville about ten days. He came to Mr. Zimmerman's office and place of business every day. I heard Deckner say, in regard to the two-ton truck sold to the Amazon Cotton Mills, that it was a quick sale. He saw the check of the Amazon Cotton Mills in the office. The check was on the desk in front of him." This testimony was excluded in the court below. We think this was error.

We think, from the facts and circumstances of this case and the view we take, that the evidence above set forth, which was excluded and like evidence as appears from the record, there was error, and on another trial the evidence should be held competent.

"Where the mortgagee expressly or impliedly consents to a sale of the mortgaged property by the mortgagor, he waives his lien, and the purchaser takes the title free from the same." 11 C. J., 624. Even an unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage, does not come within the statute of frauds. *Stevens v. Turlington,* 186 N. C., 191.

This evidence would only become material if the jury should find that the Finance Company was not the owner in due course of the Zimmerman note and title retaining contract.

We think the court below was in error in its charge to the jury on the third issue.

In *Williams v. Mfg. Co.,* 177 N. C., 515, *Walker, J.,* says: "There was evidence given for the defendant which conflicted with that introduced by the plaintiff, but the jury alone could settle this conflict; and while the plaintiff did not make out a strong case, but rather a weak one, when we review all the facts in concourse, we cannot withdraw the case from the jury, who are the triers of the facts, if there is any evidence reasonably tending to support the plaintiff's allegations," citing *Wittkowsky v. Wasson,* 71 N. C., 451; *Byrd v. Express Co.,* 139 N. C., 273, and cases cited.

For the reasons given in this case there must be a

New trial.

W. M. SPARKMAN ET ALS., CITIZENS, RESIDENTS, AND TAXPAYERS OF HALL TOWNSHIP, ETC., v. THE BOARD OF COMMISSIONERS OF GATES COUNTY.

(Filed 20 February, 1924.)

1. Schools — School Districts — Combination — County Board of Education—County Commissioners—Taxation—Elections—Statutes.

The county board of education may form new school districts by combining contiguous or adjoining special local with nonspecial existing tax districts (art. 18, ch. 136, Public Laws 1923), and upon petition of the voters filed under section 219, article 7, a valid election may be called by the county commissioners under the further provision of said article 18 to vote upon the question of a special tax for the district so formed under the statutory limitations as to the rate imposed, and the observance of the condition required by the statute to take care of the indebtedness already incurred by such of the special districts thus in the combination

as may have theretofore voted for a special school tax within their former boundaries. The question as to special-charter school districts is not presented in this case.

2. Same.

Where, by proper statutory procedure, a school-tax district has been formed by a combination of existing special and nonspecial local-tax districts, and accordingly the county commissioners have called an election for the approval of the voters of a special tax, such approval by a majority of the electors registered therein is valid, the election being for the new district thus formed, and the fact that one or several of the districts incorporated had voted against the proposed tax does not invalidate it. The sections of the Consolidated Statutes requiring the separate approval of the voters of the nonspecial school-tax territory have no application.

3. Same—Constitutional Law—Statutes.

Where nonspecial school-tax districts have been combined into a school-tax district with special school-tax districts, the nonspecial tax districts cannot maintain the position that it was necessary to the valid imposition of a special tax for school purposes within the district thus created, that the voters within each nonspecial tax district should approve it. Article 18, chapter 136, Public Laws 1923, otherwise providing, the Legislature having almost unlimited constitutional authority over these local agencies of government, and may at any time change and combine them, irrespective of territorial limits, by safeguarding certain restrictions imposed by the Constitution.

CIVIL ACTION, heard pursuant to a continuance on return to a preliminary restraining order, before his Honor, *Bond, J.*, at Elizabeth City, N. C., on 22 October, 1923. The pertinent facts as agreed upon, and the ruling of the court thereon, are embodied in his Honor's judgment, as follows:

"1. That the plaintiffs, W. M. Sparkman *et als.* are citizens of Gates County, N. C., and are residents and taxpayers of Eure Church School District in said township, district being Hall, No. 2.

"2. That the defendants are duly elected and qualified commissioners of Gates County, charged under the law with the duty of levying and having the taxes collected.

"3. That the taxes in Gates County are collected by the township tax collectors, and that Kindred Parker is the duly elected and qualified tax collector in Hall Township.

"4. That on 11 July, 1923, and prior thereto, there were a number of school districts in Gates County, among which were the Eure Consolidated, Eure Church, and Reedy Branch districts, same being consecutive and contiguous, and all of which may be embraced in one common boundary.

"5. That in Eure Consolidated District the citizens thereof had, prior to 11 July, 1923, voted upon themselves bonds in the amount of $15,000,

which were a valid and outstanding obligation on said date, and that prior thereto there had been levied and collected a maximum tax rate not to exceed 30 cents on the $100, for the purpose of paying interest on same and to create a sinking fund to retire same at maturity.

"6. That in neither of the two, Eure Church and Reedy Branch, had there ever been, prior to said date, voted any special local tax for school purposes.

"7. That on 11 July, 1923, the following petition, marked 'A,' was presented to the county board of education.

"8. That said petition was properly endorsed and approved by the Board of Education of Gates County, and by it presented to the board of county commissioners on same day, and by the said board ordered and recorded on the minutes of the said board, and all other things requisite and necessary to the calling of an election for special tax for schools in said territory, as a special school-taxing district, were done and performed.

"9. That pursuant to said petition an election was called in the special school-taxing district, to be held at Eure, N. C., on 25 August, to ascertain the will of the voters as to whether there should be levied and collected annually a local tax not to exceed 30 cents on the $100 valuation of property in the aforesaid territory embraced within the three districts—Eure Church, Eure Consolidated, and Reedy Branch districts—to supplement the six-months school fund.

"10. Said election was in all respects regular and legal.

"11. That at said election there were 194 registered and qualified voters from all three districts.

"12. That from the entire registered voters 128 voted for said tax and the remaining 66 either did not vote at all or voted against said tax.

"13. That from Reedy Branch District there were registered 16 voters and that of said number 8 voted for the tax, 4 voted against said tax, and 4 registered voters did not vote at all and consequently were counted against the tax.

"14. That from the Eure Church District there were 48 registered voters, and that of this number 2 voted for, and that the remaining 46 either voted against or did not vote at all, 40 of which did vote against the tax.

"15. That said election was held at Eure, N. C., said place being within the Eure Consolidated District, and that C. E. Sawyer was registrar and R. B. Harrell and R. C. Felton were poll-holders, all of whom were residents of the Eure Consolidated District, which district is a part of the special school-taxing district, as described.

"16. That W. M. Sparkman and J. E. Askew, Jr., two of the school committeemen of Eure Church School, went before the superintendent

of Schools on or about 3 September, 1923, and requested that a teacher be employed for their school, and that the superintendent informed them that there would probably be no teacher employed for said school, and that the students would probably be expected to attend the Eure Station School (known as Eure Consolidated), since he understood that the board anticipated consolidating the districts with the Eure Consolidated School.

"17. That the three districts referred to above were consolidated on 3 September, 1923, in accordance with the county-wide plan of organization of the county board of education. (See 'Exhibit B.')

"18. That the county commissioners of said county have levied and are now threatening to collect a 30-cent special local tax on the $100 valuation of all property in the said three districts.

"19. That this suit was brought on 29 September, 1923, and that the restraining order was served on the board of county commissioners on 1 October, 1923.

"20. That the tax book for Hall Township has not been delivered.

"21. Reedy Branch District is located within Reynoldson Township.

"It is now, upon consideration thereof, adjudged by the court that the plaintiffs' motion to continue said temporary restraining order and injunction to the hearing, be and it hereby is denied, the court being of the opinion that the facts submitted do not justify or entitle it to grant the same. Out of respect for the views of counsel for the plaintiffs who desire to have said ruling reviewed by the Supreme Court, said restraining order is continued until 25 February, 1924, and no longer, so as to preserve present conditions until that date.

W. M. BOND, *Judge.*"

It further appeared that the Board of Education of Gates County had adopted the county-wide plan pursuant to chapter 136, Public Laws 1923, sec. 73a.

Plaintiffs excepted and appealed.

Aydlett & Simpson and A. P. Godwin for plaintiffs.
T. W. Costen and Ehringhaus & Hall for defendants.

HOKE, J. Under article 18, chapter 136, Laws 1923, being an act to codify the laws relating to public schools, authority is given to county boards of education to create special school-taxing districts in territory as follows: "(1) a township; (2) two or more contiguous or consecutive districts, all of which may be embraced within one common boundary; (3) two or more contiguous or consecutive townships, all of which may be embraced within one common boundary; (4) one or more dis-

tricts and one or more townships contiguous, all of which may be embraced within one common boundary; and (5) the entire county, excluding one or more townships or one or more special-charter districts."

The power in question extends to both local and nonlocal taxing districts, but does not seem to include special-charter districts unless these last have surrendered their charters and become local-tax districts, pursuant to the provisions of section 157 of the law. This last position is not further pursued for the reason that in the present case no special-charter district is presented, but we are informed that the school authorities have construed the article so as not to embrace such districts within the meaning of article 18, unless surrender has been made as suggested. After the boundaries of the special school-tax district have been defined and recorded on the minutes of the county board of education, an election may be had for a special tax, not to exceed 50 cents on the $100 valuation of property, real and personal, within the district, on the filing of a proper petition, which shall be endorsed by a majority of the governing boards of the school districts within the designated boundary, and approved by the county board of education. Same shall be presented to the board of county commissioners, who shall order the election as requested. The character of the petition is not specifically set forth in article 18, but the same is manifestly provided for and controlled by section 219 of article 17, and is described as a "written petition, signed by twenty-five qualified voters who have resided at least twelve months within the district, and if less than seventy-five of such qualified voters are resident within the district, then by one-third of such voters."

The article further provides that if the tax as specified is approved by a majority of the qualified voters of the district, it shall operate to repeal all school taxes theretofore voted within local-tax or special-charter districts (which last may have been brought within the effects of the law), except taxes required to pay interest on bonds theretofore issued, or to retire said bonds when they mature. And the article (section 237) further provides "that the county board of education are authorized to assume and pay any and all bonded indebtedness, or part of same, from the special tax voted," provided that the revenue is sufficient to equalize the educational advantages and pay all or part of the interest and installment on said bonds.

From a perusal of the facts embodied in his Honor's judgment it appears that all of the formal requirements for the proper creation of the special district in question have been complied with, the proposed tax levy has been approved by the voters, and we can see no valid objection to the tax or the authorized procedure to collect the same.

It is contended for the plaintiffs that, as the measure was defeated in one of the nontax districts, the tax is not valid as to such territory, but

the article in question contains no such limitation, and the Court may not so interpret it. The former cases on this subject, to which we were referred (*Paschal v. Johnson,* 183 N. C., 129; *Perry v. Comrs.,* 183 N. C., 387; *Hicks v. Comrs.,* 183 N. C., 394; *Vann v. Comrs.,* 185 N. C., 171) were decisions construing the sections of the Consolidated Statutes appertaining to the enlargement of school districts, more especially section 5530, C. S., and which expressly required the approval of a majority of the voters in the added territory, but the article in question here is one providing for the creation of a new district, and in which the question of the tax shall be determined by all the voters within the boundary as defined and described in the minutes of the board, and the cases cited are not therefore apposite to the facts of the instant record.

Again, it is contended, as we understand the position, that the Legislature having created the districts, Eure Church and Reedy Branch, it was not within its constitutional power to impose a tax on said districts without a vote of the people therein; but, apart from the obligation to pay any indebtedness incurred, which is provided for in the school law, there is nothing contractual as to the continued existence or maintenance and control of these school districts. They are but public *quasi*-corporations, created by the Legislature for the exercise of governmental functions in designated portions of the State's territory, and are subject to almost unlimited legislative control.

In *Trustees v. Webb,* 155 N. C., 379, it was held, among other things: "Counties and townships are, as a rule, simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision.

"Under our Constitution, the Legislature is given power to create special public *quasi*-corporations for governmental purposes in certain designated portions of the State's territory subject to like control, and in the exercise of such power county and township lines may be disregarded."

In that case the opinion refers to *Smith v. School Trustees,* 141 N. C., 143, as follows: "Again, in *Smith v. School Trustees,* 141 N. C., 143, the Legislature incorporated a school district, confined territorially to portions of two existent townships, authorized the trustees of the district to issue bonds, levy and collect taxes, etc., and the Court, after full and careful consideration, held that this power of the Legislature over counties, townships, etc., when acting as governmental agencies, was not confined to the ordinary political subdivisions of the State, but that it authorized and extended to creating special public *quasi*-corpora-

tions for governmental purposes in designated portions of the State's territory, and that in the exercise of such power county and township lines could both be disregarded if such action was, in the judgment and expressed declaration of the Legislature, best promotive of the public welfare. And within the proper exercise of this power were included levee, school, drainage, road, and highway and other special-taxing districts."

And quotes also from *Jones v. Comrs. of Stokes,* 143 N. C., 59, opinion by the present *Chief Justice:* "The defendant suggests, however, that it infringes upon the provisions of the Constitution establishing counties and requiring them to be maintained in their integrity. But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities, and towns as governmental agencies (*White v. Comrs.,* 90 N. C., 437), but they are all legislative creations and subject to be changed (*Dare v. Currituck,* 95 N. C., 189; *Harriss v. Wright,* 121 N. C., 178), abolished (*Mills v. Williams,* 33 N. C., 558), or divided (*McCormac v. Comrs.,* 90 N. C., 441) at the will of the General Assembly." And the well-considered case of *Board of Education v. Bray,* 184 N. C., 484, is in full recognition of this same general principle.

The Legislature, therefore, having the full power, provides for the creation of a new district, as it has done, and the measure having been submitted to and approved by the voters of such district, the proposed tax levy is not open to the objection that it is superimposed without proper vote of the people, for the voters of the new district have become the proper body to pass upon and determine the question.

In the recent case of *Coble v. Comrs.,* 184 N. C., 342, the question was on the validity of a statute applicable to the county of Guilford, and therefore not a direct decision on the facts of the present record, but the principles involved in the present law were presented and fully discussed, and it was no doubt owing to the suggestions made in that valuable opinion by *Associate Justice Adams,* and the decision of the Court thereon, that the present law was framed, and may be regarded as an apposite and controlling authority on the validity of this article 18 of the general statute. And the case of *Plott v. Comrs., ante,* 125, opinion by the same learned Judge, is also an authority in support of the judgment rendered.

There is nothing to present the question as to the effect of section 29, article 11 of the Constitution, prohibiting special legislation on this subject, as the authorities here are operating under a general law.

We find no error in the record, and the judgment of the lower court is Affirmed.

E. C. WINSLOW v. S. E. SPEIGHT.

(Filed 27 February, 1924.)

Estates—Contingent Remainders—Title—Wills—Devises.

Where a testatrix devises certain of her lands to her two sons for life, with remainder to the one dying leaving issue, and should both die without issue, the title to the lands to revert to the testatrix's nearest of living kin, with a clause leaving the residue of her estate, if any, after taking out the specific devises, to be divided among her two sons: *Held*, though the testatrix's two sons were her nearest of kin, they did not take the lands specifically devised to them by descent, but under the will, and the contingency not having happened upon which they acquired the absolute fee-simple title to these lands, their contract to convey the indefeasible title thereto was not enforcible.

APPEAL by defendant from *Connor, J.*, at November Term, 1923, of EDGECOMBE.

Controversy without action, submitted on an agreed statement of facts.

Defendant, being under contract to convey certain lands to plaintiff, executed and tendered warranty deed therefor. Plaintiff declined to accept the deed and refused to make payment, claiming that the title offered was defective. This suit is to recover the option money paid by plaintiff, and which was to be returned if title proved to be defective.

His Honor, being of opinion that the deed tendered was insufficient to convey a full and complete fee-simple title to the lands in question, gave judgment for the plaintiff, whereupon the defendant excepted and appealed.

George M. Fountain for plaintiff.
Guion & Guion for defendant.

STACY, J. On the facts agreed, the title offered was properly made to depend upon the construction of the following items in the will of Sarah E. Lloyd:

"Second: I give and devise to my daughter, Penina E. Jones, for her natural life, one hundred acres of land, the same being a part of my undivided interest, in the division of the Barlow estate, and, should she die without issue, then said land to revert back to my next living kin.

"Third: I give and devise to my two sons, Frank B. Lloyd and James B. Lloyd, for their natural life, seventy-nine and one-third (79⅓) acres of land, the same being a part of my undivided interest, in the division of the Barlow estate, and, should they or either of them die without issue, then in that case the interests of them both, or the interest of either one, shall revert back to my nearest or living kin.

"Eight: My will and desire is that all the residue of my estate, if any, after taking out the devises and legacies above mentioned, shall be equally divided among my three children," etc.

The case states that at the time of the death of Sarah E. Lloyd, in 1893, her three children, Penina E. Jones, Frank B. Lloyd, and James B. Lloyd, were her "nearest or living kin." Penina E. Jones died intestate in 1903 and without issue born to her, leaving her two brothers as her only heirs at law and next of kin. Frank B. Lloyd is living, but has never married and has no issue. James B. Lloyd is living, married and has three children—Joseph, age ten; Paul, age eight, and Alice, age four. Since the death of Penina E. Jones, her two brothers have conveyed to the defendant all of their "estate, right, title and interest in possession and in expectancy" in and to the lands described in items two and three of the will of Sarah E. Lloyd.

It was adjudged by the court below that the defendant could convey a good title to the 100 acres mentioned in the second item of the will, and this is not questioned by the plaintiff. It was further adjudged that the defendant could not convey a full and complete fee-simple title to the 79⅓ acres mentioned in the third item. The appeal presents for review the correctness of his Honor's ruling in regard to the property mentioned in item three of the will.

It is agreed, if the deed tendered be sufficient to convey a full and complete fee-simple title to the 79⅓ acres, plaintiff is to fail in his suit; otherwise, not.

It is suggested that a proper construction of the third item in the will of Sarah E. Lloyd presents for consideration the questions (1) as to whether there was a devise, by implication, of the remainder in fee to the issue of Frank B. Lloyd and James B. Lloyd, respectively, by reason of the gift over to the testatrix's "nearest or living kin," should the two sons or either of them die without issue, or (2) as to whether the reversion in fee descended to the testatrix's three children pending the happening of the events upon which the estate given over was to take effect, so that the conveyance to the defendant of the life estate and the reversion merged the life estate into the reversion and destroyed the contingent remainder to the testatrix's nearest or living kin. *Bond v. Moore*, 236 Ill., 576; 86 N. E., 386; 19 L. R. A. (N. S.), 540; 23 R. C. L., 532. But for the presence of item eight in the will, and if item three stood alone, the case would probably call for a decision of these interesting questions. From the entire will, however, we think it is clear that whatever estate Frank B. Lloyd and James B. Lloyd took in the *locus in quo*, they did not take any part of it by descent from their mother; hence, if James B. Lloyd should predecease his brother, and Frank B. Lloyd should die without issue, his interest would then go to the testatrix's

nearest or living kin under item three of the will. In this event such nearest or living kin of the testatrix would necessarily be other than the defendant's immediate predecessors in title.

In view of this construction, and under the facts now of record, it would appear that the deed tendered is not sufficient to convey a full and complete fee-simple title to the property in question. The judgment entered below must be upheld.

Affirmed.

JAMES PENDER v. DAN W. TAYLOR AND LEE ALPHIN.

(Filed 27 February, 1924.)

Appeal and Error—Pleadings—Motions—Verdict Set Aside—Judgment—Premature Appeals—Dismissal.

From a refusal of a motion for judgment upon the pleadings an appeal will not directly lie, and where the verdict has been set aside in the court's discretion, there is no judgment from which an appeal may be taken, and it will be dismissed in the Supreme Court as premature.

APPEAL by plaintiff from *Connor, J.*, at November Term, 1923, of EDGECOMBE.

W. O. Howard for plaintiff.

John L. Bridgers, Henry C. Bourne, and Allsbrook & Philips for defendants.

ADAMS, J. The plaintiff brought suit to recover the sum of $10,000 and interest, the remainder alleged to be due by the defendants for the purchase of a tract of land. The written agreement of the parties is appended to and made a part of the complaint. The defendants filed an answer, in which they alleged that under the terms of the contract the plaintiff had elected to take back the land, had taken possession of it, and had thereby abrogated the contract. These allegations were denied by the plaintiff in his replication.

When the case came on for trial, the plaintiff made a motion for judgment upon the pleadings, and renewed it at the conclusion of the evidence. The court denied the motion, and the jury, in response to the issue submitted, found that the plaintiff had exercised his right to enter upon the land and had gone into possession of it. The verdict was set aside as against the weight of the evidence, and under these conditions we are asked to review his Honor's ruling.

We shall have to decline this request. No judgment has been rendered and there is no present right of appeal. It has often been held

that the refusal of a motion for judgment on the pleadings is not appealable, and that an appeal prematurely prosecuted will not be considered. *Mitchell v. Kilburn,* 74 N. C., 483; *Cameron v. Bennett,* 110 N. C., 277; *Duffy v. Meadows,* 131 N. C., 31; *Barbee v. Penny,* 174 N. C., 571; *Duffy v. Hartsfield,* 180 N. C., 151. No judgment having been entered, the appeal must be dismissed.

Appeal dismissed.

NAN G. CLARK v. J. E. HARRIS.

(Filed 27 February, 1924.)

Appeal and Error—Objections and Exceptions—Trials.

An assignment of error on appeal for error alleged upon a different theory than that upon which the case was tried in the Superior Court will not be considered.

APPEAL by defendant from *Connor, J.,* at November Term, 1923, of EDGECOMBE.

Civil action, *ex contractu,* to recover for the value of certain timber sold by plaintiff to defendant.

Upon denial of liability and issues joined, the jury returned a verdict for plaintiff, and from the judgment rendered thereon defendant appealed.

Gilliam & Bond for plaintiff.
Allsbrook & Philips for defendant.

PER CURIAM. A careful perusal of the present record leaves us with the impression that the case has been tried substantially in agreement with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

There was a contention made on the argument, and it also appears in defendant's brief, that plaintiff's cause of action should fail under the principle of accord and satisfaction (*Supply Co. v. Watt,* 181 N. C., 432), but the case was not tried upon this theory in the court below. It is well settled that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. *Hill v. R. R.,* 178 N. C., 612. Especially is this so where the change of front is sought to be made between the trial and appellate courts. *Ingram v. Power Co.,* 181 N. C., 359.

The verdict and judgment will be upheld.

No error.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. C. C. PATTERSON.

(Filed 27 February, 1924.)

1. Constitutional Law—Statutes—Contracts—Co-operative Marketing.

The provisions of the standard contract made by the Tobacco Co-operative Marketing Association with its members are valid under a constitutional statute, and upon the alleged breach thereof on the part of the member in its material parts, the equitable remedy by injunction is available to the association.

2. Appeal and Error—Injunction—Equity—Findings of Fact—Conclusiveness of Findings.

On appeal in matters of injunction involving the rights of an incorporated coöperative marketing association to receive and market the tobacco grown by its member, etc., the findings of fact by the Superior Court judge are not conclusive, and the Supreme Court will pass upon the evidence and determine the facts applicable to the relief sought.

3. Pleadings — Evasive Answers—Injunction—Equity—Contracts—Co-operative Marketing.

In proceedings for injunctive relief by a coöperative marketing association wherein the plaintiff definitely alleges that the defendant had breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of the injunctive relief.

4. Injunction—Equity—Mortgagor and Mortgagee—Liens—Parties—Co-operative Marketing Associations.

A preliminary order restraining a member of a coöperative association from disposing of the tobacco embraced in the contract in breach thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation, a position available to the lienee not a party to the action, and the restraining order should be continued to the hearing, safeguarding the rights of the lienee to be asserted by his appropriate action. The defendant being in an attitude of resistance towards the contract and denying any obligations thereunder.

CIVIL ACTION heard, on return to preliminary restraining order, before his Honor, *Connor, J.*, at Nashville, N. C., on 20 September, 1923.

The action is for the purpose of enjoining defendant, an alleged member, from disposing of his tobacco crops for the years 1922, 1923, etc., more particularly for the year 1923, in violation of his contract with plaintiff, and a preliminary restraining order and rule to show cause having been issued, and the court at the above hearing being of opinion that plaintiff was not entitled to a further continuance of the order, entered judgment that the same be vacated and the rule discharged. Plaintiff excepted and appealed.

Burgess & Joyner and Austin & Davenport for plaintiff.
A. Sapiro, E. L. Hayes, and T. E. Bowen of counsel for plaintiff.
O. B. Moss for defendant.

HOKE, J. It appears from the complaint, duly verified and presented at the hearing, together with supporting affidavits, that plaintiff is a corporation duly organized pursuant to chapter 87, Laws of 1921, "having a standard form of contract under which its members respectively contract and agree to sell and deliver to the association all of the tobacco produced by or for him as landlord and lessor during the years 1922 to 1926, inclusive, and for the professed purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and a proper compensation for his labor, expense and skill in producing it."

That defendant, having become a member and duly executed the contract to sell and deliver to the company his tobacco as stated, has thus far failed and refused to deliver any of his tobacco to plaintiff company as agreed upon by him, and avows his purpose not to do so now or at any future time. That in 1922 defendant produced and acquired, subject to the obligations of said contract, about 8,000 pounds of tobacco, and sold same to other persons in violation of his contract, and that for the year 1923 he has produced or acquired 10,000 pounds of tobacco subject to the stipulations of the contract signed by him, and refuses to deliver any part of same to plaintiff, claiming that the amount will be required to pay off a mortgage given by him on the crop of 1923 to W. R. Robertson & Co., general time merchants, in Nash County, and to the aggregate amount of $2,636.52, and which is more than sufficient to absorb the entire crop of tobacco grown by him for the year 1923, etc.

On careful perusal of the record we do not find that the defendant has made any substantial denial of the principal allegations of the plaintiff as above set forth, his sworn answer in reference thereto being as follows: "That, in answer to paragraphs 2 to 14, inclusive (these being the sections chiefly containing plaintiff's averments), this defendant does not admit the same, but demands strict proof of all of said allegations." Defendant then proceeds to state his principal defense in resistance to the restraining order in detail as follows:

"(b) That during the year 1923 W. R. Robertson & Co., general time merchants of Stanhope, Nash County, North Carolina, furnished him supplies and advances, fertilizer, etc., to make a crop, and that this defendant executed and delivered to said company a crop lien and chattel mortgage on 1 January, 1923, which said paper-writing is recorded in the registry of Nash County, in Book 262, at page 143, to which reference is specifically made.

"(c) That the amount now due under said mortgage is a note in the sum of $1,021.74, with interest, and in the further sum of $1,614.78 for supplies and advances furnished this year, which supplies and advances permitted and enabled this defendant to cultivate a crop, and that the said crop owned and raised by this defendant, as he is informed and believes and so avers, will not more than pay the indebtedness hereinbefore referred to.

"(d) This defendant also avers that he is informed and believes said W. R. Robertson & Co. is the owner and entitled to the possession of said property described in the plaintiff's complaint and affidavit, and that they forbid this defendant delivering said crop to any other person."

Upon these opposing averments the court finds that defendant is a member; that he cultivated on his land in Nash County, in the year 1923, ten acres of tobacco, and that, being wholly unable to produce the crop without such aid, he executed the mortgage or crop lien for the note and supplies. That said advancements were all necessary and actually made to defendant to enable him to make said crop and save and harvest same, and are a valid and first lien on said crop, and that all of crop will be required to pay off and discharge the said lien, and that the lienees or mortgagees have expressly forbidden defendant to deliver the crops to plaintiff or to make any disposition of them except under their direction. That defendant has not broken or threatened to break his contract with plaintiff, and thereupon entered judgment dissolving the restraining order.

In the recent case of *Coöperative Assn. v. Jones,* 185 N. C., 265, where the question was directly presented, this Court has held that the statute under which these associations are formed is a constitutional enactment; the standard contracts made by them with its members are valid and enforceable, and that the process of injunction is available when shown to be reasonably necessary to conserve and protect the rights and interests of the companies under their said contracts pending litigation, positions that have been approved by authoritative cases in other jurisdictions. *Kansas Wheat Growers Association v. Schulte,* 113 Kansas, 672; *J. A. Brown v. Staple Cotton Growers Association,* 96 Southern, 849; *Texas Farm Bureau Cotton Association v. Stovall,* 253 Southwestern, 1101; *Northern Wisconsin Coöperative Association v. Beckedall* (Wis.), decided November, 1921; *Potter v. Dark Tobacco Association* (Ky.), decided December, 1921.

The decided cases in this jurisdiction are also to the effect that in an action of this character, and on the question of plaintiff's right to an injunction, this Court is not concluded by the findings of the trial judge, but will itself pass upon and determine the facts upon which

the decision shall be properly made to depend. *Cooperative Association v. Battle, post,* 260; *Burns v. McFarland,* 146 N. C., 382; *Hyatt v. DeHart,* 140 N. C., 270.

Considering the record in view of these established principles, it appears that plaintiff has alleged in its verified averments, and with precision and definiteness, that defendant, having entered into and duly executed the standard form of contract to sell and deliver to plaintiff all of the tobacco grown by him or held as landlord, etc., for the years 1922, 23, 24, 25 and 26, produced on his farms for the year 1922 as much as 8,000 pounds of tobacco which, in breach of his contract, he had sold to other persons. That in 1923 he grew and holds as much as 10,000 pounds, subject to the provisions of the contract, and refuses to deliver any part of it, alleging that he has encumbered same by a mortgage sufficient to absorb the entire crop; and further, that he has avowed his purpose not to deliver any of his tobacco in accordance with the terms of his contract, and the only answer we find in contravention of these averments is that "defendant does not admit the same, but demands strict proof of all of said allegations." Such an averment would not be sufficient to raise issue under our ordinary rules of pleading, and on a hearing of this kind, for the purpose of obtaining the dissolution of a restraining order, must be held as evasive and entirely insufficient. On authority, it amounts to no denial at all in any proper sense of the term. *Longmire v. Herndon,* 72 N. C., 629; *Allen v. Pearce,* 59 N. C., 309; *Thompson v. Mills,* 39 N. C., 390; *Bailey v. Wilson,* 21 N. C., 182-187; 1 Joyce on Injunctions, sec. 309.

In *Allen v. Pearce, supra,* it was held that "where a defendant answers lightly and evasively to material allegations, the injunction will not be dissolved."

And in *Thompson v. Mills, supra:* "When a defendant asks the court to act on his answer, as he does, when he moves to dissolve an injunction, it is not sufficient that he should make an answer, which merely does not admit the ground of the plaintiff's equity, but it must set forth a full and fair discovery of all the matters within his knowledge or in his power to discover, and then deny the material grounds, upon which the plaintiff's equity is founded.

"An answer that is evasive, that declines admitting or denying a fact positively, when it is in the party's power, if he will, to obtain information that will enable him to admit or deny the fact, and much more, an answer that keeps back information that is possessed by a party upon a material fact, on the pretense that the defendant cannot give the information with all the minuteness of which the subject is susceptible, such an answer ought not to entitle the person who makes it to any favor."

We must conclude, therefore, for the purposes of this hearing, that defendant has broken his contract and has avowed his purpose of continuing to break it. And in reference to the mortgage for supplies urged by him in bar of plaintiff's claim and further prosecution of the suit, the defendant's evidence must be considered as unsatisfactory and insufficient, to wit, that he has executed a mortgage on the crops of 1923 more than sufficient to absorb the same, and that the holder has notified defendant not to deliver to plaintiff.

It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn, and we understand that plaintiff has no desire or purpose to interfere with any such claim to the extent that it constitutes a valid and superior lien to plaintiff's rights and interests under the contract, but the evidence of defendant as to the extent and existence of such a lien is not to our mind a full and frank statement concerning it. It appearing that "$1,021.74 is for a note and $1,614 for advances and supplies," and that these advances and supplies were required to enable defendant to make his crop, and what this note is for or when given is not set forth, and whether the instrument is such as to create a valid lien on the crop is not all clear. See C. S., sec. 2480, and cases cited, among others, *Clark v. Farrar,* 74 N. C., 686; *Loftin v. Hines,* 107 N. C., 360.

The matter here is not further pursued for the reason that the mortgagee is not thus far a party, and until he is, his rightful claims should not and cannot be in any way impaired and jeopardized in this proceeding, nor, as a rule, should a grower's rights to place a mortgage on his crop for the *bona fide* purpose of raising the same be in any way hindered or lightly interfered with, but as to this defendant, and on the facts as presented in this record, he having practically admitted that he has broken his contract with plaintiff, and intends to continue to do so, it is not for him to decide by his own *ipse dixit* what is or is not a valid lien, or the extent of it, and in our opinion he should be restrained to the hearing from voluntarily and personally making any further disposition of his crop other than as required by his contract with plaintiffs, either of the crop of 1923 or any other crop coming into his possession and control and ownership during the life of the contract, and subject to its provisions.

This injunction, however, should be drawn without prejudice to the rights of the mortgagee or lien holder to demand and receive of defendant, or to enforce delivery by any appropriate procedure, of a sufficient amount of the tobacco or other property included in his mortgage,

to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of plaintiff under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter.

These rulings in our opinion are in accord with the authorities applicable and have been decided or approved in principle by cases in this jurisdiction, among others *Yount v. Setzer,* 155 N. C., 213; *Welborn v. Sechrist,* 88 N. C., 287; *James v. Norris,* 57 N. C., 225.

Let this be certified that the judgment below dissolving the restraining order be set aside and that the same be continued to the hearing in form and effect as indicated in this opinion.

Reversed.

IN RE R. J. BAKER.

(Filed 27 February, 1924.)

Appeal and Error—Municipal Corporations—Cities and Towns—Condemnation of Lands—Nonsuit—Judgments—Fragmentary Appeal.

No appeal to the Superior Court lies by the respondent in proceedings to condemn his lands by a city for street purposes until the town has affirmed the report of the commissioners appraising the value. Upon an appeal, the city may take a voluntary nonsuit upon payment of costs where no counterclaim has been pleaded by the respondent and he has set up no equity in the matter that will entitle him to affirmative relief.

APPEAL by Baker from *Kerr, J.,* at October Term, 1923, of HERTFORD.

In September, 1919, the mayor and board of commissioners of Ahoskie instituted a proceeding to condemn a strip of the property of R. J. Baker, 50 feet wide and 70 feet deep, in order to connect Hayes Avenue and Second Street of the town, by condemning said property, and the board of commissioners appointed a committee to make the appraisement, and they reported that they agreed that the condemnation was necessary for said purposes and that the value of the property was $1,250. From the above finding of the board and valuation, Baker gave notice of appeal to the Superior Court of Hertford. The case received no action in the Superior Court until October Term, 1923, R. J. Baker having died in the meantime. At October Term, 1923, of Hertford, his personal representative and heirs at law having been made parties, the following judgment was rendered by Kerr, J.: "It appearing to the court that the petitioner, the town of Ahoskie, is not in immediate need

of the land described in the petition, and never having used or exercised any authority or acts of occupation over said land, and whatever interest or title the said town of Ahoskie may have acquired by reason of said condemnation proceedings it now relinquishes the same, and such rights and interests now revert in fee simple to R. J. Baker and his heirs forever. On motion of W. R. Johnson, attorney of the town of Ahoskie, petitioner, it is considered, ordered, and adjudged that the condemnation proceedings in this action be and the same is hereby dismissed by the court. It is further adjudged that the town of Ahoskie pay the costs, to be taxed by the clerk of the court." The respondents appealed.

Walter R. Johnson for town of Ahoskie.
John E. Vann and D. C. Barnes for appellant.

CLARK, C. J. There was no trial, judgment of condemnation or affirmation in this case by the town of Ahoskie or in the Superior Court. There was a proceeding begun for condemnation and a report of the commissioners appointed, that they thought that the condemnation should be made and that the value of the property was $1,250. An appeal was taken from this in October, 1919, but it was premature for there was no judgment of the board from which the appeal could be taken. C. S., 1723. It pended in the Superior Court for four years, and then the proceeding was abandoned by the town by entry of a nonsuit, as it had a right to do.

In *R. R. v. R. R.*, 148 N. C., 64, it was held: "Neither party is entitled to trial by jury until the coming in of the report and after its confirmation." The proceedings were entirely irregular, and at October Term, 1923, the town made a motion of nonsuit and discontinued the proceeding. The court refused to proceed with the case on this record, allowed the discontinuance or nonsuit, and properly adjudged the costs against the town. The appellant admits in his brief that the appraisement had not been reported to the board of commissioners of the town and confirmed by them. The appellant's brief says that he moved to "allow the report of the board of appraisers to be confirmed." In *Cahoon v. Brinkley*, 168 N. C., 258, it is said: "The plaintiff had a right to submit to a judgment of nonsuit, inasmuch as no verdict had been rendered."

It does not appear in fact that anything has been done except the order for an appraisement and a report by them which, without confirmation by the board, was improvidently appealed to the Superior Court, and after sleeping there for four years, the town asked to have the action dismissed at its own cost.

The court found as a fact, as set out in the record, that the town has never been in possession of the strip of land, and had never exercised any ownership or authority over it, and there is nothing in the record showing any judgment or confirmation by the commissioners of the town which conferred any interest or lien in the land or authority over it against the respondents. The respondent had appealed, it is true, but he had set up no counterclaim, and there was no equity involved. The town had a right to take a nonsuit in the proceeding upon payment of the costs.

Affirmed.

STATE v. KINCHEN EDWARDS.

(Filed 27 February, 1924.)

Health—Municipal Corporations—Ordinances—Milk—Pasteurization.

An ordinance requiring milk to be pasteurized under reasonable regulations before being sold for human consumption within its limits, and requiring an annual license therefor from the county health officer, is a valid exercise of the police power of a city; and a fine of twenty-five dollars may be imposed upon one violating its provisions.

APPEAL by defendant from *Connor, J.*, at October Term, 1923, of EDGECOMBE.

Criminal prosecution tried upon a warrant charging the defendant with selling milk within the town of Tarboro which had not been pasteurized as required by ordinance. From a conviction and fine of $25 and costs, the defendant appeals.

Attorney-General Manning, Assistant Attorney-General Nash, and Gilliam & Bond for the State.

G. M. Fountain and W. O. Howard for defendant.

STACY, J. Defendant assails the validity of his trial upon the ground that the ordinance under which he was convicted is an unreasonable exercise of the police power and is therefore void. The pertinent provisions of the ordinance in question are as follows:

"(b) After 1 August, 1918, it shall be unlawful for any milk or cream to be sold for human consumption in the town of Tarboro which shall not have been previously pasteurized in accordance with the standard set forth in this ordinance. (Standard duly set forth in a subsequent section.)

"(d) No milk may be sold in the town of Tarboro except by persons having a license for this purpose, which license first shall have been

obtained from the county health officer. Such license must be renewed yearly, and is subject to cancellation at any time in case of violation of any of the provisions of this ordinance by the licensee.

"(w) Violation of any of the provisions of this ordinance shall constitute a misdemeanor, and a fine of $25 shall be imposed upon any person found guilty of such violation."

That a city in the exercise of its police power may require milk for human consumption to be pasteurized, and may prescribe reasonable regulations under which the pasteurization shall be done, is the decision in *Koy v. Chicago,* 263 Ill., 122; 104 N. E., 1104; Ann. Cas., 1915 C, 67. To like effect is the holding in *Pfeffer v. Milwaukee,* 177 N. W. (Wis.), 850; 10 A. L. R., 128. And *S. v. Kirkpatrick,* 179 N. C., 747, is in support of the same position. We think the ordinance in question is valid. *Lee v. Waynesville,* 184 N. C., 565; 6 R. C. L., 241. Its violation is admitted by the defendant.

No error.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. JOHN BATTLE.

(Filed 27 February, 1924.)

1. Constitutional Law—Statutes—Co-operative Marketing.

A coöperative association formed under the provisions of chapter 87, Public Laws of 1921, whereby its members agree to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable.

2. Equity—Specific Performance—Contracts—Personal Property—Vendor and Purchaser—Co-operative Marketing.

Injuries from the breach of contract by a member with the Coöperative Tobacco Marketing Association, formed under the provisions of chapter 87, Public Laws of 1921, to market his tobacco, etc., cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts.

3. Injunction—Co-operative Marketing—Contracts—Equity—Evidence.

Where in the suit of a tobacco marketing association for injunctive relief against the defendant for breaching his contract to market his tobacco with it according to its terms, he resists upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary: *Held,* the injunction should be continued to the

hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry.

4. Injunction—Appeal and Error—Evidence—Findings—Review.

On appeal from the denial of the continuance of a restraining order the facts as found by the Superior Court judge are not conclusive on the Supreme Court, and the latter may review the evidence appearing in the record.

CIVIL ACTION heard on return to preliminary restraining order before his Honor, *Connor, J.*, in chambers at Rocky Mount, on 3 December, 1923.

The action is to obtain a permanent injunction forbidding defendant to dispose of his tobacco crop for 1922, etc., in violation of his contract as member of plaintiff association. The case being heard on affidavits and evidence, the court dissolved the restraining order, finding, among other things, that defendant was not a member of plaintiff association. Plaintiff excepted and appealed.

Burgess & Joyner and Henry C. Bourne for plaintiff.
A. Sapiro, E. L. Hayes, and T. E. Bowen of counsel for plaintiff.
Thorne & Thorne for defendant.

HOKE, J. It appears from the pleadings and evidence in the cause that plaintiff is an association duly organized under chapter 87, Laws of 1921, having a standard form of contract by which its members respectively agree to sell and deliver to the association "all of the tobacco produced by or for him or acquired by him as landlord or lessor during the years 1922, 23, 24, 25, 26," etc., and for the professed purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and a proper compensation for his labor and skill in producing it. In the recent case of *Coöperative Assn. v. Jones,* 185 N. C., 265, where the questions were fully considered, it was held that the act was constitutional, and the associations formed under it and the contracts as made by them with members were valid and enforceable, and that the remedy of injunction was properly available to the companies when necessary to a proper enforcement of their rights under the contracts made with its members.

Not only is a preliminary injunction expressly authorized by the statute and stipulated for in the contract itself, but it is clear from a proper consideration of the entire agreement, its nature, terms and purpose, that specific performance is required for its proper and adequate enforcement, and that an injunction will lie whenever it is shown to be reasonably necessary to conserve the property and the rights of plaintiff therein pending litigation.

True, as a general rule, specific performance is not allowed in contracts for sale and delivery of personal property, but the position does not prevail when it appears that a failure to deliver will frustrate the essential purpose of the contract, and the award of damages will prove entirely inadequate to compensate the injured party. This in effect was held in *Coöperative Assn. v. Jones, supra,* and cases cited, notably *Oregon Coöp. Association v. Lentz et al.,* 212 Pacific, 811; and is in accord with recognized principles applicable in such cases. *Zeiger v. Stephenson,* 153 N. C., 528; *Ellett v. Newman,* 92 N. C., 519; *McGowin v. Remington,* 12 Pa. St., 56; Pomeroy on Contracts, secs. 10, 11 and 12, and note 1 to sec. 11; 1 Joyce on Injunctions, sec. 444.

Plaintiff company, then, having a right to an injunction against its members who threaten to break their contract to the destruction or serious impairment of plaintiff's rights thereunder, and defendant denying his membership and avowing his purpose and his right to dispose of his tobacco elsewhere, the question presented is chiefly dependent upon the fact of plaintiff's membership, and considering the case in that aspect, our decisions are to the effect that an injunction should be continued to the hearing when a plaintiff has established an apparent right to property and the writ is reasonably necessary to protect and preserve such rights pending the inquiry. *Cain v. Rouse,* 186 N. C., 176; *Johnson v. Jones,* 186 N. C., 235; *Yellow Cab Co. v. Creasman,* 185 N. C., 551; *Proctor v. Fertilizer Works,* 183 N. C., 153; *Seip v. Wright,* 173 N. C., 14; *Tise v. Whitaker,* 144 N. C., 508; *Cobb v. Clegg,* 137 N. C., 153.

In *Proctor's case, supra,* it is held: "Where the plaintiff, applying for injunctive relief as the main remedy sought in his action, has shown probable cause, or it is made to appear that he will be able to make out his case at the final hearing, or where the dissolution of the temporary restraining order would probably work him irreparable injury, it should be continued to the final hearing."

In *Cobb v. Clegg,* at page 159, *Associate Justice Walker,* delivering the opinion, said: "In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined."

And in *Tise v. Whitaker, supra,* it was held, among other things: "When the main purpose of an action is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts

which make for plaintiff's right and are sufficient to establish it, a preliminary restraining order will be continued to the hearing."

Applying these principles, we do not take the same view of the facts presented as seems to have impressed the court below. It appearing that the accredited representative of plaintiff swears that defendant signed the standard contract subject to the approval of his landlord, and that the landlord approved the same; that landlord swears that he was consulted by defendant and that he did approve it; and two or more distinterested witnesses testify that defendant admitted to them that he had become a member.

True, the defendant himself swears that he joined subject to the approval of his landlord and his supply merchant, and that the latter, who has since died, never gave his approval, and defendant's wife swears that her husband told her he had not joined, and his Honor finds the facts to be as claimed by defendant. But this finding by his Honor is evidential only and not conclusive, and the decisions are that on a hearing of this character the Court will determine for itself the facts upon which it will act, and on consideration of the entire evidence we are of opinion that there is such serious question as to the rights of the parties involved in this controversy that the restraining order should be continued till they are determined at the final hearing, and the judgment of the lower court dissolving the same pending litigation be and the same is hereby

Reversed.

RHODE ISLAND HOSPITAL TRUST COMPANY, EXR., v. R. A. DOUGHTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 27 February, 1924.)

1. Taxation—Statutes—Corporations—Shares of Stock—Transfer of Shares—Inheritance.

Under the provisions of C. S., 7772, an inheritance or transfer tax is imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in a corporation of another State domiciled here, under the laws of this State, as a condition precedent to the right to have said stock transferred on the books of the corporation having the statutory proportion of its property located within this State and conducting its business here.

2. Same—Constitutional Law.

The provisions of C. S., 7772, imposing, among others, an inheritance tax upon nonresident distributees under the will of a nonresident testator or upon his distributees under the canons of descent, who are nonresidents, in a corporation domesticated and operating with two-thirds of its

property here, under our statute, are not in conflict with Article I, section 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States.

3. Same—Property Valuations.

The tax imposed upon the transfer of shares of stock in a corporation domesticated under our statute, where the decedent and the legatees or distributees are all nonresidents, is upon the right of succession or on the right of a legatee to take under a will or by a collateral distribution in case of intestacy, and is not a tax on tangible property merely because the amount of the tax is measured in its relation to the value of the corporate property as a whole, and is regarded as in the nature of a ransom or toll levied upon the right to transmit or receive the shares occasioned by the death of the former owner.

4. Corporations—Taxation—Shares of Stock—Inheritance Tax—Charter.

A State creating a corporation has the power to impose an inheritance tax upon the transfer by will or devolution of the stock of such corporation held by a nonresident at the time of his death, by reason of its authority to determine the basis of organization and the rights and liabilities of all of its shareholders therein.

5. Constitutional Law—Statutes—Corporations—Taxation—Inheritance Tax.

Every presumption is in favor of the constitutionality of a statute, and the legal fiction that shares of stock, being personal property, is considered as being with the person of a nonresident shareholder, will not be so construed as to invalidate a statute taxing its transfer as an inheritance tax.

6. Corporations—Shares—Courts—Jurisdiction—Status of Shareholders.

A certificate of stock is a written acknowledgment by a corporation of the interest of the holder in its property and franchise, the legal status of which is in the nature of a chose in action, and the value of the shares is measured by the value of all the property owned by the corporation, including its franchise, entitling him to his proportionate share of the profits during its continuance, and to his *pro rata* share in its net assets upon its dissolution.

7. Corporations—Shareholders—Statutes—Public Policy.

It is the policy of this State, since 1887, as ascertained by the interpretation of our statutes on the subject, to regard the interest of a stockholder in a domestic corporation, for the purpose of taxation, as identical with that of the corporation.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1923, of WAKE.

Civil action to recover the amount of an inheritance tax, or transfer tax, paid by plaintiff under protest and sought to be regained by this suit.

From a judgment as of nonsuit, or one denying recovery, the plaintiff appeals.

Tillinghast & Collins, Pou, Bailey & Pou, and Colin McRae Makepeace for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

STACY, J. The Rhode Island Hospital Trust Company, of Providence, Rhode Island, executor under the will of George Briggs, deceased, brings this suit to recover of the defendant, Commissioner of Revenue of North Carolina, the sum of $2,658.85, being the amount exacted by the defendant and paid by the plaintiff, involuntarily and under protest, by way of an inheritance tax, or a transfer tax, on shares of stock owned by decedent, at the time of his death, in the R. J. Reynolds Tobacco Company, a corporation chartered under the laws of the State of New Jersey and domesticated in the State of North Carolina under C. S., 1181, with its principal place of business in this State and with two-thirds of the total value of its property located herein. The said corporation maintains a transfer office in the city of New York, and the paper certificates representing the shares of stock owned by the decedent at the time of his death have never been in this State. George Briggs was not a resident of North Carolina, but during his lifetime, or at least the latter part thereof, he resided in the State of Rhode Island and was a citizen of that State at the time of his death, 29 October, 1919. None of the beneficiaries under his will live in North Carolina. The question, therefore, directly presented is whether the Legislature of this State can impose an inheritance tax, or a transfer tax, upon the right of nonresident legatees or distributees to take by will or to receive under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in the R. J. Reynolds Tobacco Company, and to require the payment of such tax as a condition precedent to the right to have said stock transferred on the books of the corporation. A satisfactory answer to this question would seem to necessitate an examination into the basic character of the tax imposed.

But, before entering upon an investigation of this nature, we observe a suggestion by the plaintiff that the statute in question (chapter 90, Public Laws 1919, now C. S., 7772 *et seq.*) does not warrant the interpretation placed upon it by the defendant and the State Tax Commission. This position, on the argument, was not made the subject of serious debate. Indeed, we think there is but little room for construction. The statute undertakes to impose an inheritance tax upon the transfer of all real and personal property of every kind and description, and "such property or any part thereof or interest therein within this State" which shall pass by will or by operation of law from a testator

to his legatees or devisees, or from an intestate to his heirs or distributees; and section 6, in part, provides:

"The words, 'such property or any part thereof or interest therein within this State,' shall include in its meaning bonds and shares of stock in any incorporated company, incorporated in any other State or country, when such incorporated company is the owner of property in this State, and if 50 per cent or more of its property is located in this State, and when bonds or shares of stock in any such company not incorporated in this State, and owning property in this State, are transferred by inheritance, the valuation upon which the tax shall be computed, shall be the proportion of the total value of such bonds or shares which the property owned by such company in this State bears to the total property owned by such company, and the exemptions allowed shall be the proportion of exemption allowed by this act, as related to the total value of the property of the decedent."

It is clear, we think, from the language used, that the Legislature intended to levy the tax imposed and which is sought to be recovered in this suit.

Plaintiff's next position is, that if the law is to be construed so as to authorize an imposition of the tax in question, then the statute is unconstitutional, both under Article I, section 17, of the State Constitution and also under the Fourteenth Amendment to the Constitution of the United States. This brings us to a consideration of the nature of the tax in dispute.

There has been, and still is, some slight difference of opinion among courts as to the exact nature of an inheritance tax. It is agreed, however, that such a tax is levied, not upon the property itself, but upon its transfer, change of ownership, or devolution. The principal difference arises over the question as to whether the tax is laid on the privilege of transmitting property or on the privilege of receiving the property so transmitted. *Prentiss v. Eisner,* 267 Fed., 16. The former is sometimes called a transmission tax, or legacy tax, while the latter is usually styled a succession tax. But in each instance it is generally conceded that the tribute or contribution exacted before the property can pass from the dead to the living, or from the testator to the objects of his bounty, has some of the characteristics of an excise or custom duty. It is a ransom, or toll, levied upon the right to transmit, or upon the right to receive property, the transmission or receipt of which is occasioned by death. *In re Inman,* 199 Pac. (Or.), 615; 16 A. L. R., 675.

In this State the particular tax now in question is imposed upon the right of succession. "We do not regard the tax in question as a tax on property, but rather as a tax imposed on the succession—on the right of a legatee to take under the will, or of a collateral distribution in the

case of intestacy. . . . Neither can it be held a tax on property merely because the amount of the tax is measured by the value of the property." *Rodman, J.,* in *Pullen v. Comrs.,* 66 N. C., p. 363.

"The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law." *Brown, J.,* in *In re Morris Estate,* 138 N. C., p. 262. See, also, *Corp. Com. v. Dunn,* 174 N. C., 679; *Norris v. Durfey,* 168 N. C., 321; *In re Inheritance Tax,* 168 N. C., 356; *S. v. Bridgers,* 161 N. C., 247.

It clearly appears, we think, from the language of the statute under which the present tax is imposed, that the Legislature intended to levy an inheritance tax, with certain exceptions, on the succession or devolution of all real and personal property of every kind and description within the jurisdiction of the State, and upon any interest therein, whether owned by a resident or nonresident at the time of his death.

It is universally conceded that a State may levy an inheritance tax on the transfer by will or devolution of all property within the power of its reach, whether such property be real or personal, tangible or intangible, corporeal or incorporeal. *Hooper v. Shaw,* 176 Mass., 190; *Morrow v. Durant,* 118 N. W. (Ia.), 781; *Neilson v. Russell,* 69 Atl. (N. J.), 476; *Plummer v. Coler,* 178 U. S., 115; note 127, A. S. R., 1059; 26 R. C. L., 208. Construing the succession-tax law of Massachusetts, *Knowlton, C. J.,* in *Kinney v. Stevens,* 207 Mass., 368, said: "This language indicates an intention on the part of the Legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the commonwealth." And the same may be said of the North Carolina statute.

It is equally well established that a State tax on property must be limited to property within the territorial jurisdiction of the State. "Property situated without that jurisdiction is beyond the State's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment to the Constitution." *Metropolitan Life Ins. Co. v. New Orleans,* 205 U. S., 395; *Wallace v. Hines,* 253 U. S., 66; *Western Union Tel. Co. v. Kansas,* 116 U. S., 1; *Tappan v. Merchants Nat. Bank,* 19 Wall., 490.

But the tax now under consideration is not a direct tax on property. It is a tax imposed upon the transfer, transaction, or right of succession, and is merely measured in amount by the value of the property transferred. *S. v. Bullen,* 143 Wis., 512; *Magoun v. Bank,* 170 U. S., 298; *U. S. v. Perkins,* 163 U. S., 625; *Nettleton's Appeal,* 76 Conn.,

242; *Thompson v. Kidd,* 74 N. H., 92; *Minot v. Winthrop,* 162 Mass., 118; *S. v. Hamlin,* 86 Me., 503. It "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." *New York Trust Co. v. Eisner,* 256 U. S., 345.

"As to residents, the transfer tax is on the succession, and is imposed on the right of succession; but, as to nonresidents, it is a tax on the transfer of property within the jurisdiction of the Court." *Patterson, J.,* in *In re Bishop,* 81 N. Y. Sup., 474.

Undoubtedly, the State has power to levy an inheritance tax in respect to all property upon which it has power to impose an ordinary property tax, and in addition thereto it has the power to impose a succession tax in respect to certain property upon which it cannot levy an ordinary property tax. *State ex rel. Graff v. Probate Court,* 128 Minn., 371. For example, no State, in the exercise of its general power of taxation, can levy a direct tax on obligations of the United States, and yet a legacy of United States bonds is not exempted from the inheritance-tax laws of a State, because such tax is not laid on the bonds themselves, but on the right to acquire them by will, or by devolution in case of intestacy. *Plummer v. Coler,* 178 U. S., 115. So, also, a State may tax the inheritance of its own bonds or bonds of municipal corporations, though it expressly provided, when the bonds were issued, that they should be exempt from taxation. *Orr v. Gilman,* 183 U. S., 278.

The tax in question being upon the right of succession and not upon the property transferred or received, it is not subject to the constitutional limitations with respect to uniformity and equality, nor is it a "direct tax," within the meaning of the Constitution of the United States. *Scholey v. Rew,* 23 Wall., 331; 26 R. C. L., 196. "Whether an inheritance tax shall be laid or not, and the rate thereof, and the exemptions allowed, are matters which rest in the power and discretion of the law-making department." *Clark, C. J.,* in *Corp. Com. v. Dunn,* 174 N. C., p. 681.

"A succession tax is not a property tax upon the privilege of receiving property by intestate or testate succession. It is in the strict sense an excise tax. It is like a transfer or other excise taxes. It need not be proportional under our Constitution. It is not subject to the restrictions and limitations which attach to property taxes under the Federal Constitution. (Citing authorities.) Excise or succession taxes may be measured, in part at least, by the value of property which is exempt from taxation, such as government bonds, merchandise in bond, and other like tax-exempt property." *Rugg, C. J.,* in *Welch v. Treasurer,* 223 Mass., 87.

The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the State in which

its owner was a resident at the time of his death. *Bullen v. Wisconsin,* 240 U. S., 625. This position is upheld upon the principle that the *situs* of personal property, for the purpose of taxation, is said to be in the State where the owner resides and has his domicile. *Mobilia sequuntur personam. Gallup's appeal,* 76 Conn., 617; *In re Swift,* 137 N. Y., 77; *People v. Union Trust Co.,* 255 Ill., 168; *McCurdy v. McCurdy,* 197 Mass., 248; *In re Hartman,* 70 N. J., Eq., 664.

In *Frothingham v. Shaw,* 175 Mass., 59, a resident of Massachusetts died, owning stocks and bonds of foreign corporations and money in bank in the State of New York. An inheritance tax imposed by the domiciliary State on the personal property in New York was assailed upon the ground that this personal property was not "property within the jurisdiction of the commonwealth of Massachusetts." And, further, that the succession as to this property in New York took place under the laws of that State and not under the laws of Massachusetts. Speaking to these two contentions, the Court said:

"1. In arriving at the amount of the tax, the property within the jurisdiction of the commonwealth is considered, and we see no reason for supposing that the Legislature intended to depart from the principle heretofore adopted, which regards personal property for the purposes of taxation as having a *situs* at the domicile of its owner.

"2. The petitioners further contend that the succession took place by virtue of the law of New York. But it is settled that the succession to movable property is governed by the law of the owner's domicile at the time of his death. This, it has been often said, is the universal rule, and applies to movables wherever situated. . . . If there are movables in a foreign country, the law of the domicile is given an extraterritorial effect by the courts of that country, and in a just and proper sense the succession is said to take place by force of, and to be governed by, the law of the domicile. Accordingly, it has been held that legacy and succession duties as such were payable at the place of domicile in respect to movable property, wherever situated, because in such cases the succession or legacy took effect by virtue of the law of domicile."

See, also, *In re Helena,* 236 Pa., 213, as reported in 46 L. R. A. (N. S.), 1167, where a wealth of information on the subject will be found in the valuable and exhaustive note compiled by the annotator.

Among the classes of personal property, the succession to which it has been held may be taxed at the domicile of the owner, are shares of stock in foreign corporations. *In re Hodges,* 170 Cal., 492; *In re Bullen,* 143 Wis., 512; *Hawley v. Malden,* 232 U. S., 1.

On the other hand, the State creating a corporation has the power to impose an inheritance tax upon the transfer, by will or devolution, of the stock of such corporation held by a nonresident at the time of his

death; and this by virtue of the authority of the chartering State to determine the basis of organization and the liability of all of its shareholders. *Corry v. Baltimore,* 196 U. S., 466; *Moody v. Shaw,* 173 Mass., 205; *In re Culver,* 145 Iowa, 1; *People v. Griffith,* 245 Ill., 532; *Dixon v. Russell,* 78 N. J. L., 296; *In re Bronson,* 150 N. Y., 1; *In re Whiting,* 150 N. Y., 27; 26 R. C. L., 216. Speaking to this question, in *Greves v. Shaw,* 173 Mass., 205, *Knowlton, J.,* said: "Such a corporation, being in a sense a citizen of this State, and having an abiding place here akin to the domicile of a natural person, is subject to the jurisdiction of the commonwealth, and is in fact with the commonwealth. The stockholders are the proprietors of the corporation, which is itself the proprietor of the property owned and used for the ultimate benefit of the stockholders. While the corporation has a full and complete legal title to the corporate property, its ownership is in a sense fiduciary; for, on winding up its affairs, the surplus, after the payment of debts, must be divided among the stockholders," citing *Fisher v. Essex Bank,* 5 Gray, 373-377; *Field v. Pierce,* 102 Mass., 253; *Graham v. LaCrosse & Milwaukee R. R.,* 102 U. S., 148; *Hollins v. Brierfield Coal & Iron Co.,* 150 U. S., 371.

Thus it is seen that, under the fiction of *mobilia sequuntur personam,* the universal succession may be taxed in one State—the domiciliary State—while, according to the fact of power, the singular succession may be taxed in another. *Knowlton v. Moore,* 178 U. S., 53; *Coe v. Errol,* 116 U. S., 517. As said in *Hartman's case,* 70 N. J. Eq., p. 667: "The great weight of authority favors the principle adopted by the New York Court of Appeals, holding that the tax imposed is on the right of succession under a will, or by devolution in case of intestacy; and that, as to personal property, its *situs,* for the purpose of a legacy or succession tax, is the domicile of the decedent, and the right to its imposition is not affected by the statute of a foreign State which subjects to similar taxation such portion of the personal estate of any nonresident testator or intestate as he may take and leave there for safe-keeping, or until it should suit his convenience to carry it away."

Animadverting upon this situation in *Blackstone v. Miller,* 188 U. S., 189, *Mr. Justice Holmes* remarked: "No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there. (Citing authorities.)

"No doubt, this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted also that one and the same State should be seen taxing on

the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law."

Again, in *Kidd v. Alabama,* 188 U. S., 730, the same learned justice took occasion to say: "No doubt, it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

Every presumption is indulged in favor of the validity, or constitutionality, of an act of the law-making body; and hence the courts do not hesitate to disregard the maxim, *mobilia sequuntur personam,* where fiction runs counter to fact, or to resort to it in order to uphold a statute. And, though this may lead inevitably to double taxation, it apparently violates no constitutional provision. *Mann v. Carter,* 74 N. H., 345; 15 L. R. A. (N. S.), 150; *In re Hodges,* 170 Cal., 492. In the case of *In re Whiting,* 150 N. Y., 27, *Vann, J.,* in construing a succession-tax statute, and speaking for the Court, said: "Thus the Legislature intended, as I think, to repeal the maxim, *mobilia personam sequuntur,* so far as it was an obstacle, and to leave it unchanged so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State."

"For certain purposes, the maxim of the common law was *'mobilia sequuntur personam,'* but that maxim was never of universal application and seldom interfered with the right of taxation." *Mr. Justice Brewer,* in *Adams Express Co. v. Auditor,* 166 U. S., 185.

Under the New York statute, prior to the amendment of 1911, bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited in a safe-deposit vault within that State, and owned by a nonresident, were held to be "property within the State" and subject to an inheritance tax, although, so far as appears, they were present merely for safe-keeping. *In re Whiting, supra;* 26 R. C. L., 214. See, also, *Wheeler v. Sohmer,* 233 U. S., 434.

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner. . . . Notes and mortgages are of the same nature. . . . We see no reason why a State may not declare that, if found within its limits, they shall be subject to taxation." *Mr. Justice Brewer,* in *New Orleans v. Stempel,* 175 U. S., 309.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more than archaic

conditions," says *Mr. Justice Holmes,* in *Blackstone v. Miller, supra,* a case in which the question presented was whether the State of New York had the right to tax a transfer by will of personal property in that State owned by a testator who had died domiciled in Illinois, and where the whole estate, including the property in New York, had been taxed in the domiciliary State of Illinois. The New York statute was upheld and the tax imposed thereunder sustained.

The common-law rule that personal property follows the person (hence its name) and has its *situs* at the domicile of the owner, is a legal fiction which must give way, in matters of taxation, to the real facts of the case. *Green v. Van Buskirk,* 7 Wall., 139; *St. Louis v. Wiggins Ferry Co.,* 11 Wall., 423. It has been doubted by some as to whether this rule ever had any just application to shares of stock in incorporated companies, which, for most purposes, must be controlled by the *lex loci* of the corporation. Story on Conflict of Laws (7 ed.), secs. 364, 383, and authorities cited; *Kidd v. Alabama, supra.* "And in States bound together by a constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee,* 243 U. S., 90.

A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value, except that derived from the company issuing it, and its legal status is in the nature of a chose in action. The value of all the property owned by a corporation, of whatever kind, including its franchise, is the true and fair measure of the value of all of its stock. When it is said that a person owns a certain number of shares of stock in a corporation, it is meant that such person has a right to participate in the profits of the corporation, and in its property on dissolution, after payment of its debts, in the proportion that the number of his shares bears to the whole capital stock. Clark on Corporations, ch. 10; *R. R. v. Comrs.,* 87 N. C., 426; *Redmond v. Comrs.,* 87 N. C., 122.

That the stock of a corporation has no intrinsic value separate and apart from the property of the corporation is clearly shown from what is said in *Gibbons v. Mahon,* 136 U. S., 549, and *Towne v. Eisner,* 245 U. S., 418, relative to a stock dividend:

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each shareholder remains the same. The only change is in the evi-

dence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones. . . . In short, the corporation is no poorer and the stockholder is no richer than they were before." See, also, *Logan County v. U. S.*, 169 U. S., 255.

But more directly to the point at issue is the language of *Chief Justice Chase,* in *Van Allen v. The Assessors,* 70 U. S., 598:

"It is true that the shareholder has no right to the possession of any part of the corporate property while the corporation exists and its affairs are honestly managed. He has committed his interest, for a time, to the possession and control of the corporation of which he is a member, and he has only a member's voice in the management of it.

"So a man who has leased a farm has no right to possession or control during the lease; but who denies his property in the farm? And if a dozen owners join in the lease, has not each one an interest in the property to the extent of one-twelfth?

"So, if for the time the property of the shareholder is placed beyond his direct control and converted into property of the association, how can that circumstance affect the intrinsic character of his shares as shares of the whole corporate property? How can a man's shares of any property be the subject of valuation at all if not with reference to the amount and productiveness of the property of which they are a part? What value can they have except that given them by that amount and that productiveness? A certificate of title to a share is not a share. It is evidence of the shareholder's interest. His interest may be transferred by the transfer of the certificate; but it is not the certificate that is valued when the worth of the share is estimated either by the speculator in the market or by the tax assessor. It is the property which it represents that is valued by the speculator, often with reference to speculation only, but by the public officer, always, if he does his duty, by the real worth of the property, all things considered."

To like effect is the language of *Gray, J.,* in the case of *In re Branson,* 150 N. Y., 8:

"The shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant; but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs; they have the right to share in surplus earnings, and, after dissolution, they have the right to have the assets reduced to money and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property. As said in *Jermain v. L. S. and M.*

S. R. Co. (91 N. Y., 492), it 'represents the interest which the shareholder has in the capital and net earnings of the corporation'; or, as *Parke, B.,* put it, in *Bradley v. Holdsworth* (3 M. & W., at p. 424), it is 'a right to have a share of the net produce of all the property of the company.' Corporate shares must be regarded as property within the broad meaning of that term. Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to. In legal contemplation the property of the shareholder is either where the corporation exists, or at his domicile; accordingly as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation. . . . Hence it cannot be said, if the property represented by a share of stock has its legal *situs* either where the corporation exists or at the holder's domicile, as we have said in the *Enston* and *James cases* (*In re Enston,* 113 N. Y., 181; *In re James,* 144 *id.,* 12), that the State is without jurisdiction over it for taxation purposes. As personalty, the legal *situs* does follow the person of the owner; but the property is in his right to share in the net produce and, eventually, in the net residuum of the corporate assets, resulting from liquidation. That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property, as to which the right relates and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the State for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner."

See, also, quotation from *Knowlton, J.,* in *Greves v. Shaw, supra.*

It has been held that the owner of shares of stock in a corporation, organized for pecuniary profit, has an insurable interest in the corporate property—any qualified interest or any interest in the subject-matter being an insurable interest. *Warren v. Ins. Co.,* 31 Iowa, 464; *Seeman v. Ins. Co.,* 21 Fed., 778; *Ætna F. Ins. Co. v. Kennedy,* 161 Ala., 600. See, also, *Batts v. Sullivan,* 182 N. C., 129.

The basis of the rule making a corporation a distinct entity and the reasons for departing from such rule will be found in 14 C. J., 59: "Although the doctrine that a corporation is a legal entity and person in the law distinct from the members who compose it, will always be recognized and given effect, both at law and in equity, in cases which are within its reason and when there is no controlling reason against it, and although in some cases it seems to have been given effect contrary to reason, it is clear that a corporation is in fact a collection of individuals who, in the case of modern private corporations, really own its property and carry on the corporate business, through the corporation and its officers and agents, for their own profit or benefit, and that the idea of the corporation as a legal entity or person apart from

its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way; and it is now well settled, as a general doctrine, that, when this fiction is urged to an intent not within its reason and purpose, it should be disregarded and the corporation considered as an aggregation of persons, both in equity and at law."

It has been the policy of the Legislature of this State since 1887 to treat the interest of a stockholder in a domestic corporation, for purposes of taxation, as identical with that of the corporation; and hence an individual stockholder is not required to list his shares of stock for taxation where the State has already exercised the right to tax such shares through the corporation itself, or "at its source," as it is sometimes called. Speaking of this identification of the capital stock of a domestic corporation in the hands of a shareholder, with the property of the corporation, *for purposes of taxation, Adams, J.,* in *Person v. Watts,* 184 N. C., 499, said:

"So, by virtue of the statute, there is nothing of value possessed by a corporation that is allowed to escape taxation. Certainly there can be no doubt that the shareholder's 'investment' is taxed as the Constitution requires. The truth is, the certificate of stock represents the shareholder's investment in the corporation as the landowner's deed represents his investment in the land. If the land is taxed, why tax the deed? If the capital stock is taxed, why tax the certificates which represent the capital stock? No doubt the Legislature possesses the power to repeal the statute and to tax both; no doubt it possesses the power to devise a system of taxation that would be more burdensome to all classes, but if the Constitution does not require it, why should such additional burden be imposed? It is not denied that shares of stock in a restricted sense are the individual property of the owner, and in such sense may be considered as separate from the capital stock. The holder may sell his certificate without the consent of the company, but in doing so he sells only his interest in the corporation. His interest as a shareholder may become adverse to that of the corporation, but by investing in the capital stock he parts with the individual control of his money. It is only in this limited sense that shares of stock are separate from the corporation. In a broader and more real sense the interest of the shareholder is inseparable from that of the corporation. In the larger sense there is but one property, for shares of stock have value only as the taxed property of the corporation has value. During his lifetime the owner can derive no income from his shares unless the business of the corporation earns a profit; and upon his death, when his personal property passes to his distributee, it is not the certificate that is subject to an inheritance tax, but under a special statute the

value of the owner's interest in the corporation represented by the certificate, just as such tax is assessed, not upon the deed, but upon the value of the land which descends from the ancestor to the heir. It seems, therefore, to be unquestionable that if the corporation be required to pay a tax on the capital stock as it is valued under the statute, and the shareholders a similar tax on all their shares, double the amount of the money or property contributed by the shareholders is thereby taxed, and no play upon words can escape the logic of this conclusion. The Constitution neither forbids nor requires double taxation, but the Legislature has refrained from levying the double tax. The Constitution requires that investments in stocks shall be taxed, but it does not forbid the exemption of shares from taxation when the capital stock itself is taxed. And as the controversy turns upon the validity or invalidity of the statutory exemption of shares of stock, it is apparent that the question whether taxing the individual shares as well as the capital stock is called double taxation is not as affecting the merits of the appeal a matter of material concern."

This same rule is extended to certain foreign corporations, and is applicable to the R. J. Reynolds Tobacco Company (of which its resident stockholders have taken advantage), as witness the following provision in the general revenue law: "Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, or if such corporation has tangible assets within this State assessed for taxation at a value exceeding the par value of the total stock owned by citizens of this State, and the said corporation pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations."

Thus it will be seen that, for all practical purposes, so far as the question of taxation is concerned, the R. J. Reynolds Tobacco Company stands on substantially the same footing as a domestic corporation. It has come into the State upon this condition and accepted the benefit of our laws. It has domesticated here.

Applying the principle above stated to the instant case, it is apparent, we think, that the Legislature intended to put aside the fiction of separate interests between the corporation and its shareholders and to impose an inheritance tax upon the transfer by will or devolution of the interests of nonresident stockholders in corporations, chartered in any other State or country, "when such incorporated company is the owner of property in this State, and if 50 per cent or more of its property is located in this State." Unless this view is to prevail, a corporation, created under the laws of another State, may come into North

Carolina, with all of its property located here and protected by our laws, with its entire business carried on in this State, and yet the holdings of every nonresident stockholder would be exempt from our inheritance-tax laws. It was the purpose of the Legislature to prevent such a contingency or possibility.

The foregoing considerations distinguish the case at bar from those cited and relied upon by appellant; but, if not entirely so, we must decline to follow them, as we think the act in question is constitutional.

The transfer now under consideration took place certainly by the permission and under the ultimate protection, if not by the direct operation, of our laws. *Thomas v. Matthiessen,* 232 U. S., 235; 58 L. Ed., 577. To point out the various differences between the authorities cited and the instant case would only be a work of supererogation. The alpha and omega of every case must be determined by the facts. We cite the authorities chiefly relied upon by appellant, all of which have been carefully scrutinized: *Tyler v. Dane County,* 289 Fed., 843; *In re McMullen's Estate,* 192 N. Y. Sup., 49; *In re Harkness Estate,* 83 Okla., 107; 204 Pac., 911; *S. v. Dunlop,* 28 Idaho, 784; 56 Pac., 1141; *Welch v. Burrill,* 223 Mass., 87; 111 N. E., 774; *Oakman v. Small,* 282 Ill., 360; 118 N. E., 775; *People v. Griffith,* 245 Ill., 532; 92 N. E., 313; *People v. Dennett,* 276 Ill., 43; 114 N. E., 493.

The cases of *S. v. Brim,* 57 N. C., 300, and *Evans v. Monot,* 57 N. C., 228, are not at variance with our present position.

There is still another ground upon which the authority of a State to levy an inheritance tax has been upheld, namely, the necessity of resorting to the courts of the State to enforce a right acquired from a nonresident decedent. *In re Houdayer,* 150 N. Y., 37. Deposits in a bank belonging to a nonresident owner at the time of his death and debts due from a resident to the estate of a nonresident decedent may be subjected to an inheritance tax in the State of the debtor's residence, in the latter case or where the bank is located in the former, notwithstanding the established legal fiction that the *situs* of a debt is usually at the residence of the creditor, for it is ordinarily at the residence of the debtor, if at all, that the debt may be enforced. *Blackstone v. Miller,* 188 U. S., 189; *Bliss v. Bliss,* 221 Mass., 201; *In re Rogers,* 149 Mich., 305. Contra: *Gilbertson v. Oliver,* 129 Ia., 568.

The rights incident to a share of stock in a corporation—to partake of the surplus profits of the corporation, and ultimately, on its dissolution, to participate in the distribution of its assets, after payment of its debts—can be maintained and enforced only in the jurisdiction where the property of the corporation is situated. True these rights, in the instant case, might be asserted in the Federal courts; but in its final analysis the rights of the parties would be determined, in a measure

at least, by the laws of North Carolina. Speaking to a similar question in *Bliss v. Bliss,* 221 Mass., 201, it was said: "The bonds could not be collected by any process in the courts except by invoking Massachusetts law."

But it is contended that if the present assessment be sustained it will result in requiring the payment of two or three taxes of like character by the same legatees for the one right of succession to the property in question. This unfortunate situation, if it be true, cannot control the determination of the question presented, for such a condition frequently arises, and while its presence always induces most careful consideration on the part of the courts, it must be submitted to unless it can be avoided under settled rules relating to the subject, especially in the face of a positive declaration by the law-making department. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri T. and K. Ry. Co. v. May,* 194 U. S., 267.

It is further suggested that the Legislature of 1923, realizing the hardship occasioned by situations like the present, has modified the provisions of the law now under consideration; but if so, this cannot avail the plaintiff in the instant case. The testator died 29 October, 1919, while the provisions of the 1919 statute were in full force and effect.

From the foregoing we conclude (1) that the defendant and the State Tax Commission have properly construed chapter 90, Public Laws 1919, as imposing the tax now in question, and (2) that the said act is constitutional.

The judgment of the Superior Court will be upheld.

Affirmed.

ADDENDUM.

Since the argument of this case and the preparation of the opinion, our attention has been called to a decision of the Supreme Court of Wisconsin, *Shepard v. State* and *Shepard v. Harper, Public Administrator,* decided 12 February, 1924, in which the conclusions reached by the United States District Court in the case of *Tyler v. Dane County, supra,* are sanctioned and approved. There are certain fundamental differences which distinguish this case, as well as the other authorities cited by plaintiff, from the case at bar. In the first place, Wisconsin, for all purposes, unlike North Carolina for purposes of taxation, adheres to the doctrine of separate and distinct interests between the capital of a corporation and its capital stock. "Such has been and still is the settled law of this State, and it is beyond the power of the Court

to alter it even if it so desired," says the Wisconsin Court. For some purposes, this distinction is very important, especially in dealing with the relative rights, *inter se,* of the corporation and its shareholders; but for purposes of taxation, we think it is within the power of the Legislature to treat the pro rata interest of a stockholder in the corporate property as identical with that of the corporation, or simply as a share in the corporate entity. *Person v. Watts,* 184 N. C., 516, 517. Such was the direct holding of this Court in *Parks v. Express Co.,* 185 N. C., 428. To paraphrase the language of *Chief Justice Clark* in that case, appearing on page 433, it may be said here: In the present case the R. J. Reynolds Tobacco Company, though incorporated in New Jersey, is doing business in this State and is subject to its jurisdiction. The shares of stock held by the decedent at the time of his death in that company was an obligation of the company to its stockholder. It was the "property of the stockholder in the hands of the company doing business here."

The question as presented to us is not one of policy for the courts, but one of power for the Legislature. It is peculiarly the function of the law-making body to levy assessments and to devise a scheme of taxation. *Trust Co. v. McFall,* 128 Tenn., 645. In the second place, the R. J. Reynolds Tobacco Company has its principal place of business in this State, with two-thirds of the total value of its entire property located herein, and for all practical purposes, so far as the question of taxation is concerned, it stands on substantially the same footing as a domestic corporation. It is domesticated here. Similar conditions were not presented in any of the cases cited and relied upon by appellant.

CLARK, C. J., dissenting: It is difficult to understand upon what principle of constitutional law it can be legally provided that if the Reynolds Tobacco Company, a New Jersey corporation, but doing business here, had 66 2-3 of the total value of its property located in this State, the estate of the decedent, domiciled in Rhode Island and who has never even been in this State, must pay an inheritance tax of $2,658.85 on the stock which he owned in said company; but if the said Reynolds Tobacco Company had paid taxes on 66 1-3 only of its property located in this State, the decedent's estate would have been liable to not one cent of inheritance tax.

The Constitution of this State, Art. V, sec. 3, which guarantees equality and uniformity of taxation as a protection to the weaker and less influential part of our people from oppression by over-taxation caused by the exemption of other property from taxation, provides as follows: *"Taxes shall be by uniform rule and ad valorem: Laws shall*

be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and, also, all real and personal property according to its true value in money."

In *Person v. Watts,* 184 N. C., 499, the majority of this Court held, at bottom of page 508, that while the Legislature could require the individual stockholder residing here, and therefore receiving the benefit of the protection of our laws, to pay on his shares of stock, the Court could not enforce this provision of the Constitution of equal and uniform taxation, and in the later case of *Person v. Doughton,* 186 N. C., 723, by a divided Court, it was held that the Court could not enforce the taxation of shares of stock in corporations outside the State though held by stockholders in this State.

It is therefore inexplicable how the State has jurisdiction to tax the property of the estate of this decedent who resided in Rhode Island and had no property here, or tax its devolution by the laws of the domicile of the owner over which this State can have no control.

By the decision in *Person v. Watts, supra,* there was held exempted from the uniform taxation which is clearly required by the Constitution, on a fair estimate, at least 1,500 million dollars of domestic stocks owned in this State, and by the decision in *Person v. Doughton,* 186 N. C., 723, the Court again disclaimed the right to require the taxation of over 200 million dollars on a fair estimate of foreign stocks owned by residents and taxpayers in this State. The uniform and ad valorem taxation required by the Constitution upon these immense amounts invested by shareholders in the stocks of railroads, water-power companies, banks and other corporations would have vastly reduced the rate of taxation upon all other property in the State and would have complied with the requirement of the constitutional provision subjecting *"all investments in stocks"* to the same uniform rate of taxation required of all investments in lands, livestock and other property which the decision in *Person v. Watts* (bottom of page 508) expressly states that the Legislature *could* have required to be taxed.

It has always been contended since *Madison v. Marbury* that when the statute does not conform to the constitutional requirements the courts will hold it invalid to that extent. In the present case the decedent, whose estate is taxed $2,658.85, has never been in this State, and it is more than difficult to see how the State acquires jurisdiction over his property when it cannot enforce the constitutional requirement of equal and uniform taxation as to investments in stocks owned by residents of this State to the extent of nearly 2,000 million dollars "invested in stocks," domestic and foreign.

The decedent owned no property here. The stock, the title to which was in the decedent, followed his person according to the well-settled

principles of law. In *Pullen v. Corporation Commission,* 152 N. C., 553, *Manning, J.,* said: "It is likewise well settled by the language of our State Constitution, by many decisions of this Court and of the Supreme Court of the United States, and is now generally accepted law that the property of a shareholder of a corporation in its shares of stock is a *separate and distinct* species of property from the property, whether real, personal, or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted." Therefore it follows that the decedent as a shareholder in the Reynolds Company had no property here, and we can neither tax it nor its devolution.

Brown, J., in the same case, concurring, says, at page 562: "I agree, also, that it is well settled that the shares of stock in any corporation, when owned by individuals, are separate and distinct property from the assets of the corporation and may be taxed as such."

In the same case, *Hoke, J.,* at page 582, quoting from *Bank v. Tenn.,* 161 Tenn., 146: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders, are two *distinct pieces of property.* The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen v. Assessors,* 70 U. S. (3 Wall.), 244, cited in *Farrington v. Tenn.,* 95 U. S., 678. This statement has been reiterated many times in various decisions by this Court, and is not now disputed by any one."

A later case, *Brown v. Jackson,* 179 N. C., 363, 371 (1920), cites and approves the above cases. In our own Court there are many other cases to the same effect. *Comrs. v. Tobacco Co.,* 116 N. C., 446; *Chief Justice Smith* in *Belo v. Comrs.,* 82 N. C., 415 (33 Am. Reports, 668), and *Ashe, J.,* in *Worth v. R. R.,* 89 N. C., 291. There are other cases exactly in point and should be followed.

The law as above stated is also clearly summed up to the same effect in 37 Cyc., 758, 759, that "the capital stock of a corporation and the shares in which it is divided are separate and distinct interests and each of a taxable character," citing numerous cases from Alabama, Georgia, Illinois, Indiana, Iowa, Kentucky, North Carolina, Ohio, Tennessee, Virginia, Washington, and the U. S. Supreme Court (see notes on pages 758, 759), and on page 759 it is further said: "Shares of stock in a foreign corporation held by resident owners may be taxed to them without regard to the taxation of the capital or property of the corporation at the place of its domicile"; citing cases from California, Georgia, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Ohio, and Rhode Island.

In the same volume (37 Cyc.), 821, it is said: "Since the capital of a corporation, which is its property, is a distinct and separate thing from the interest of stockholders, represented by the shares they severally hold, and since the principle which forbids double taxation is not violated, at least according to decisions in many States, by assessing the capital to the corporations and the shares to their holders, it follows that shares of stock in a domestic or foreign corporation may properly be assessed for taxation to their holder at the place of his domicile, irrespective of taxation which may be imposed on the corporation itself in respect to its capital or franchise," citing cases from California, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, and the U. S. Supreme Court.

To the same purport, 14 Corpus Juris., 387, 388, secs. 509 and 510, says: "Although shares of stock are intangible and rest in abstract legal contemplation, they nevertheless are property—a species of incorporeal property, consisting in rights in the proceeds, management and assets of the company, so that they may be the subject of conversion and have the other incidents of property"; citing cases from the U. S. Supreme Court, Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and West Virginia, and says further (section 510): "Contrary to the early opinion in the case of corporations owning real estate, it is now very generally agreed that shares of stock in corporations are personal property, whether they are declared to be such by statute as is sometimes the case, or not, and whether the property of the corporation itself is real, as in the case of mining companies, land companies, railroad companies, canal companies and the like, or only personal," citing decisions from the U. S. Supreme Court, Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, Wisconsin, and England.

Also to the same effect, 26 Ruling Case Law, p. 184 (sec. 155), says: "An individual may be taxed in the State in which he lives on shares of stock in either domestic or foreign corporations," and at page 290 says: "It is recognized that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock and may be separately taxed although the property and franchises of the corporation are also taxed where they are situ-

ated," and adds, citing *Smith, C. J.*, in *Belo v. Commissioners,* 82 N. C., 415; 33 Am. Reports, 688: "So, also, the shares of stock are taxable to the owners, even if the capital stock of the corporation is exempt from taxation by law." And in the same volume (26 R. C. L.), at page 289 (sec. 254), it says: "Shares of stock in corporations are a species of intangible personal property which may be taxed to the individual owner in the State in which he resides, whether the corporation is domestic or foreign, even if the corporation does no business and owns no property in such State," citing numerous cases.

As the devolution of the shares of stock in the R. J. Reynolds Company belonging to the decedent Briggs passed by operation of the laws of the State where he died domiciled, and the persons to whom it should pass by operation of law or the power to convey it by will is solely under the control of the State of Rhode Island, it is difficult to see what authority North Carolina has to tax such devolution or interfere with it in any way. If this State could tax the right of devolution at all, it could tax it 100 per cent, for there is no provision in the Constitution which limits the amount of inheritance tax.

If, however, it should be held that the shares of stock are the property of the corporation, it has already been taxed under the majority decisions in *Person v. Watts* and *Person v. Doughton, supra,* and there has been no devolution of his property which can be taxed by this State.

Such devolution of his property is made subject to the laws of the domicile, and if it is the property of the corporation, the transfer upon the books of the Reynolds Company is purely a matter of shifting its own property under its own regulations.

In *Evans v. Monot* (1858), 57 N. C., 227, *Pearson, C. J.*, says: "A share of the stock of the corporation is a thing incorporeal, a money right which entitles the owner to participate in the general management of the concerns of the corporation by being a member in the meeting of the stockholders to elect officers and do other acts of the kind; to demand or receive from the corporation a portion of whatever may be on hand at its dissolution." The distinction between ownership of shares of stock of a corporation and ownership of the property of a corporation is a fundamental concept of the law of corporations. The corporation is an entity like a natural person, and the title to its property is vested in it and not in the stockholders. 5 Fletcher on Corporations, sec. 3433; Cook on Corporations (6 ed.), sec. 12, and cases there cited. This in fact is the fundamental idea of a corporation. The stockholders are not liable for its debts, and it is not liable to theirs. While a majority of the stockholders can control the corporation, it is a separate and distinct entity.

When a resident of this State invests a sum, whether in livestock or corporation stock, he is liable to taxation thereon, but when a nonresident invests in the stock of a corporation located here he has no property liable to taxation in this jurisdiction. Nor can he be taxed here for an inheritance tax when a nonresident.

In a late case, *Welch v. Burrill* (1916), 223 Mass., 87, the Court said: "It is impossible to predicate jurisdiction over nonresident shareholders in a foreign corporation merely upon the physical presence of property belonging to that corporation within the territory of the State. . . . That State has no jurisdiction to impose a tax upon such succession. The privilege or commodity of passing title to the stock is the thing which is taxed. That requires no sanction of the laws of that (other) State (where the corporation operates) for its complete and effective legal transition from ancestor to heir or testator to legatee." That is, this State has no authority to impose the inheritance tax upon the Briggs estate, he being a resident of Rhode Island, simply because he owned stock in a corporation of New Jersey doing business here and which passed to his legatee or next of kin without the permission or act of this State.

If this State could impose a tax upon the legal devolution of the shares of stock of a nonresident, it could make that tax 100 per cent and turn the whole amount into the treasury of this State.

In another recent case, *In re McMullan's Estate* (1922), 199 App. (N. Y.) Div., 393; 192 N. Y. Supp., 49, the Court said on this very point, at page 53:

"It has already been pointed out that the State cannot enforce a tax upon the transfer of shares of stock of a foreign corporation owned by a nonresident decedent, where neither the corporation nor the owner is within its jurisdiction. Of course, a foreign corporation owning real property located in this State may be subjected to a tax, so far as such property is concerned, upon the ground that the real property in this State constitutes a *res*, over which the State and its courts may entertain jurisdiction. But this jurisdiction would not apply to a nonresident stockholder of such foreign corporation, for the reason that he is not an owner of the real estate."

It should be noted that this was not the case of the construction of a statute to determine whether the property taxed was property within the State, but was a question as to whether a tax could be levied by an express statute on the transfer of stock of a nonresident decedent in a foreign corporation owning real estate within New York, which is exactly the case here, and the Court held that there was no jurisdiction in the State (Illinois) of the foreign corporation to levy such tax. This case has been affirmed by the New York Court of Appeals.

In short, it may be said that the decisions are uniform that a State has no jurisdiction to impose an inheritance tax on the transfer of stock of a foreign corporation owned by a nonresident decedent merely because the corporation owns property within the State. Numerous authorities to that effect can be cited, but as it is understood this case will be taken to the U. S. Supreme Court, it is unnecessary to encumber the record with such citations.

In *People v. Dennett* (1916), 276 Ill., 43, it is said: "The relation of the stockholder to the property of the corporation has been so long settled by uniform decisions that it is no longer the subject of discussion. The owner of shares of stock in a corporation is not the owner of the property or of any share of the property of the corporation, in any legal sense. The stockholders of a corporation completely organized do not hold the relation of partners, and they have neither legal nor equitable title to the property of the corporation."

There are some States whose constitutions do not require, like the Constitution of this State, that "all moneys, credits, investments in *bonds, stocks,* joint-stock companies or otherwise, and also all real and personal property, according to its true value in money," shall be taxed by uniform rule and ad valorem. In some, but not in all of these, the influence of the great corporations and of holders of large blocks of stock has been sufficient to secure the exemption of stocks and bonds from all taxation, but it is believed that this has not been held in any State whose constitution has the same provision as ours, requiring the equal and uniform taxation of all property.

This provision in our Constitution was for the protection of those who, not having idle capital to invest in stocks and bonds, are now forced to pay not only taxes upon their own property, but that which should be borne by this immense amount of capital invested in "stocks" and bonds which has been made "tax free." By legitimate deduction from the statistics of the U. S. Income Tax Report there is, as above stated, nearly or quite two thousand millions of dollars invested in stocks of corporations by residents here, and also probably three thousand millions in bonds which is absolutely withdrawn from any taxation whatever, thus made "tax free" by the influence and for the benefit of its owners and to the cost of all others. If, according to the requirement of our Constitution, this immense wealth was taxed equally with investments in livestock, real estate and other property, the wealth-producing property of the community would probably pay less than half of the present burden which is borne by its owners. The tax thereon should be paid by the large holders of this wealth who are equally protected by the laws in their persons and property but who now are exempted from any share thereon of the burden of government and the protection they receive.

"Investments in bonds and stocks" being the individual property of the holders thereof, the holders if residents here are taxable thereon, irrespective whether the stock they hold is in corporations incorporated or operated in this State or elsewhere. These stocks are their property, bought with their money or inherited, subject by proper proceeding to payment of their debts, and to be bequeathed or sold at their will.

It is small compensation for the loss of the taxation upon this immense volume of wealth to attempt to reach out and tax the devolution by death or will of the same kind of property—investments in stocks and bonds—of a nonresident who has received no protection or benefit from our State Government. Whatever protection the company and its property have received presumably has been paid by the property of the corporation here which has been protected, but the nonresident holder of the shares does not owe the State anything. The resident holder of shares of stock, whether domestic or foreign, has been protected in his person and his property, and therefore should pay his fair share of the burdens of the State, county, and municipal governments.

The majority opinion in *Person v. Watts,* 184 N. C., at bottom of page 508, admits that the Legislature *can* tax the shares in the hands of its owners, but the language of the Constitution is that the Legislature *shall* pass laws taxing uniformly and ad valorem all property, specifically reciting therein "investments in stocks and bonds," and such "investments" every one knows are made by the buyer and not by the corporation that issues the stocks and bonds. The word *"Investment" ex vi termini,* shows that the holder has invested his money in such property, and the Constitution requires that he shall be taxed on that investment. He is here and has had the benefit of the protection of himself and his property; the investment is recited in the Constitution as property to be taxed uniformly like all others. But the decedent Briggs did not live here, he had no property here. By his death his shares passed by his will or by the statute in the State where he resided. The corporation was here and has been taxed on its property. It is true that when a resident here holds stocks in corporations in another State, such corporations may have paid tax on its property there, but his property, that is, the shares which he can control and sell and receive money for, are here, and he as a holder of such property has been protected and should pay his share of the expenses of the government under which he lives.

Our Constitution imperatively requires that the Legislature shall pass laws taxing by uniform rule and ad valorem all property, and further specifies in section 5 of the same article what property may be exempted. The statute before us exempts an immense amount of property belonging to those who have idle wealth and not within the list

of the property which by Constitution, Art. V, sec. 5, can be exempted. The question before us is which shall govern—the Constitution or the statute. The statute for many years taxed all investments in stock as the Constitution requires, and the opinion in *Person v. Watts, supra,* says the Legislature can do so now even if it were styled "double taxation" by those wishing to escape all taxation on it. It is no compensation to those thus required to pay the taxes from which "Big Wealth" is unconstitutionally exempted to seek out and collect small amounts from nonresident shareholders, when we are exempting the many millions belonging to resident shareholders.

To exempt from taxation the above enormous investments in stocks and the still larger investment in bonds owned by citizens and residents here, who are protected in their persons and property, by the taxation collected from other citizens whose burdens would be much reduced by the uniform taxation of these investments in stocks and bonds, which the Constitution requires, and to hold that the decedent in Rhode Island, over whom and his property we have no jurisdiction, can be forced to pay the petty sum involved in this litigation, would seem similar to the instance in the Scriptures—which is quoted with reverence—"like straining at a gnat and swallowing a camel."

The consequence of our system of making the stocks and bonds of great accumulations of capital "tax free," and necessarily "double taxing" all other property, is a great rush of money to invest in "tax-free" stocks and a great pressure for the issuance of bonds that capital may also be invested in "tax-free" bonds. The result is a scarcity of money for use by those who need it for the improvement of farm lands and otherwise, and application to Congress for the creation of land banks and other devices by which ultimately the owners of farm lands may become mere tenants at will of their creditors.

It is true that the great corporations have great influence and can use it to procure favorable legislation by making their stocks "tax free" in open defiance of the Constitution, but the Constitution was provided for the very purpose of prescribing rules of equality and justice which should not be infringed by any great monetary or other influence, and should be upheld by the courts.

In *R. R. v. Comrs.,* 91 N. C., 454, it is held that "a nonresident holder of shares of a corporation in this State is not liable to tax here. Such property is beyond the jurisdiction of the State and subject only to that in which the holder has a domicile."

The decisions in *Person v. Watts, supra,* and *Person v. Doughton, supra,* went off upon the proposition that a *mandamus* would not lie in such case though there are many decisions that it will lie. See cases cited in 184 N. C., at pp. 538-541; but aside from that, if the Court had held that the failure to observe the vital constitutional requirement

that all property, including "investments in stocks and bonds," should be taxed equally and uniformly was invalid, it cannot be doubted that the Legislature would have remedied the defect. In any view the failure to collect taxes on the immense amount invested by residents of this State in stocks and bonds, domestic and foreign, cannot be remedied by taxing nonresidents upon the small amount of stocks held by them in corporations doing business in this State as this act attempts to do. We shall do our duty if we tax residents of this State and the property of nonresidents if found here.

J. S. R. HINNANT, ADMINISTRATOR OF W. T. HINNANT, v. TIDEWATER POWER COMPANY.

(Filed 27 February, 1924.)

1. Railroads — Carriers — Street Railways—Employer and Employee — Negligence — Res Ipsa Loquitur — Collisions — Evidence—Questions for Jury—Statutes.

In an action by the administrator of a deceased employee of an electric railway company to recover for his intestate's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's actionable and continuing negligence proximately caused the employee's death, and, under the doctrine of *res ipsa loquitur*, raises the issue for the determination of the jury as to whether the defendant's negligence proximately caused the death, though the intestate's contributory negligence may also have been one of the proximate causes thereof. C. S., 160, 3465, 3466, 3467, 3468.

2. Same—Presumptions—Prima Facie Case—Burden of Proof.

In an action by the administrator to recover damages for the negligent death of his intestate, an employee of the defendant railroad company, the fact that it was caused in broad daylight by a collision with another of defendant's trains having the right of way, raises a *prima facie* case of defendant's actionable negligence sufficient to sustain a verdict in plaintiff's favor, the burden of proof remaining with the plaintiff, though subject to the defendant's evidence in rebuttal; and an instruction to this effect is sustained on the evidence in this case.

3. Same—Continuing Negligence—Proximate Cause—Rules.

In an action against a street railway company to recover for the negligent death of the plaintiff's intestate wherein it was admitted that the death resulted from a head-on collision in broad daylight with another of defendant's trains on its trestle, and there is evidence tending to show there was continuing negligence on the defendant's part in having its motorman on the other car to continue to run on its right-of-way schedule under the circumstances, and also on the part of the intestate motorman in violating the defendant's rule by talking to another employee on the platform with him, the question of proximate cause cannot be determined as a matter of law in defendant's favor on its motion as of non-

suit, but leaves the issues as to negligence and contributory negligence for the jury to determine, under proper instructions as to proximate cause, under the rule of the prudent man.

4. Same—Contributory Negligence—Comparative Negligence—Damages—Statutes.

In an action against a railroad company to recover for the negligent death of plaintiff's intestate, an employee engaged at the time in the course of his employment, as such employee, contributory negligence under the provisions of our statute is not a complete bar to the plaintiff's right of recovery, but is considered by the jury only in diminution of his damages. C. S., 3467.

STACY, J., took no part in the consideration or decision of this appeal.

APPEAL by defendant from *Sinclair, J.*, and a jury, at March Term, 1923, of NEW HANOVER.

This is a civil action brought by J. S. R. Hinnant, administrator of W. T. Hinnant, for damages against the Tidewater Power Company. W. T. Hinnant was a motorman and employed by the defendant corporation that operated an electric suburban line of railroads from the city of Wilmington to Wrightsville Beach, N. C. He was a motorman on a passenger train running between Wilmington and Wrightsville Beach. The contention of the plaintiff is that his intestate was the motorman on a passenger train which was run and operated upon a regular schedule time promulgated by defendant company, and, in the absence of special orders to the contrary, the passenger trains were under the rules of the company given the right of way over all other cars on the line. That at the time plaintiff's intestate was killed, on 25 August, 1920, no special order had been issued granting to any other train the right of way over the train plaintiff's intestate was operating as motorman. That it was the duty of defendant to keep its track clear so that the train plaintiff's intestate was operating would have an unobstructed way and be able to make the schedule required by the rules of the defendant. That all other trains were required to clear the track for at least five minutes ahead of the schedule upon which plaintiff's intestate was running. That the defendant promulgated certain rules in regard to operating its trains. That on 25 August, 1920, the defendant negligently and carelessly, and in utter disregard of the rights of plaintiff's intestate and his safety, and in violation of the rules of the company, ran or caused to be run a freight or baggage car out and upon the main line upon the schedule time of the train, which the plaintiff's intestate was running. That it was run at a high rate of speed and in head-on collision with the plaintiff's intestate's train on a long high trestle, in which collision plaintiff's intestate was killed.

That defendant negligently and carelessly employed as motorman on the freight or baggage car a man whom it knew or should have known

was incompetent and unfit to be trusted in such a position, and at the time the baggage car was run out on the main line, and at the time of the collision, it was being operated by an incompetent colored man, a coemployee of the motorman. That the motorman and the colored employee negligently failed to keep a proper lookout. If a proper lookout had been kept they would have seen plaintiff's intestate's train coming upon its schedule time and could have stopped the baggage car, reversed it, and gotten out of the way and given timely signals to plaintiff's intestate in time to have prevented the collision and killing of plaintiff's intestate. That some of defendant's other employees on the train run by plaintiff's intestate did negligently and carelessly violate the rules of the company by coming out on the platform when plaintiff's intestate was performing his duty and indulge in conduct which distracted his attention, and that such acts were one of the contributing proximate causes of plaintiff's intestate being killed.

The defendant contends that at the time of the collision plaintiff's intestate was not running on regular schedule time, but was proceeding from Wilmington to Wrightsville Beach for the purpose of taking up his schedule or regular run, and his train was not entitled to the rights and privileges of a regular passenger train running on regular time, as it was the duty of such a train to get out of the way of regular trains.

The defendant admits that rules were promulgated and charges the plaintiff's intestate with violating some of them, and alleges that it was as much plaintiff's intestate's duty to observe these rules as it was the duty of any other employee, and charges that the violation by plaintiff's intestate of the rules was the proximate cause of the collision and injury to him.

The defendant denies that it employed an unfit and incompetent motorman on the baggage car. "The defendant admits that another employee went out onto the platform and he and plaintiff's intestate engaged in conversation, contrary to the rules of the company. The defendant says that the rules of the company, with which the plaintiff's intestate was perfectly familiar, made the motorman responsible for the safe operation of the car, and his allowing any one else to engage him in conversation so as to distract his attention was gross negligence and the proximate cause of the injury."

The defendant denies all liability and submits that the collision and accident referred to in the complaint was due to the negligence of the plaintiff's intestate.

For a further defense the defendant alleges:

"That the motorman had been in the employ of the defendant company for many years and was perfectly familiar with the rules and

regulations of the defendant company; that he had run on this route and on passenger trains for years; that he knew that the defendant operated a freight car which in the morning took the garbage and other refuse stuff from the beach for the purpose of cleaning up, and that said car was frequently partly unloaded on the fill in the sound between Harbor Island and Wrightsville Sound; that he knew that this car left the beach for the mainland somewhere between six and six-thirty, and he usually met it at Wrightsville and had not done so; that he was not running on schedule time but was taking the train to Wrightsville Beach to pick up his schedule and was compelled to get out of the way of trains running on schedule time, and to that end had discretion as to the manner of running; that he came to Wrightsville and the freight car was coming from Harbor Island, and it was much more than half way across the trestle, and the motorman of the freight car blew his signal many times but plaintiff's intestate, instead of being attentive to his duty and looking down the track, as it was his plain duty to do, when he could have seen the freight train approaching, as it was a perfectly clear day and in broad daylight, was engaged in laughing and talking with some one else, and this inattention, disobedience of rules and negligence on the part of the plaintiff's intestate was the sole proximate cause of the accident or contributed proximately to it."

The issues submitted to the jury and their answers are as follows:

"1. Was the plaintiff's intestate killed by the negligence of the defendant, Tidewater Power Company, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff's intestate, W. T. Hinnant, guilty of contributory negligence, as alleged in the defendant's answer? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $12,000."

The court below rendered judgment on the verdict for plaintiff, and defendant excepted, assigned error, and appealed to this Court.

There are numerous exceptions and assignments of error in the record. We will consider the ones material to this case and other pertinent facts and contentions in the opinion.

E. K. Bryan for plaintiff.
Rountree & Carr for defendant.

CLARKSON, J. The statutory law in reference to actions of this character is as follows:

C. S., 160. "When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party

had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default causing the death amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

C. S., 3465. "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, express or implied, made by any employee of such company to waive the benefit of this section shall be null and void."

C. S., 3466. "Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

C. S., 3467. "In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided, however,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

C. S., 3468. "In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of any of its employees, such

employee shall not be held to have assumed the risk of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence."

The defendant's counsel, in their able and analytical brief, say, "After a more careful examination, we think the salient points which we desire to present to the Court may be treated under a comparatively few heads."

The first position taken by defendant in its argument here and brief is that the plaintiff—on all the evidence—should have been nonsuited. The defendant contends "What is negligence is a question of law, and when the facts are admitted or established is for the Court." Burdick on Torts (2 ed.), 429. In *Russell v. R. R.*, 118 N. C., 1111, it is stated thus: "Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the Court to determine whether the injury has been caused by the negligence of one or the concurrent negligence of both of the parties." *Stewart v. R. R.*, 137 N. C., 690; *Ramsbottom v. R. R.*, 138 N. C., 41; *Taylor v. Stewart*, 172 N. C., 205; *Taylor v. Lumber Co.*, 173 N. C., 112. We think this contention as to the law correct, but in the instant case there are certain facts tending to show negligence on the part of defendant that are not admitted or established. Upon a motion to nonsuit, the evidence in the case is construed in the light most favorable to the plaintiff. At the close of plaintiff's testimony defendant moved to nonsuit, and this motion was renewed at the close of all the testimony. We think the court below was correct in refusing to nonsuit plaintiff. *Nowell v. Basnight*, 185 N. C., 148.

It is undisputed in the pleadings or evidence in the case that plaintiff's intestate was an employee of defendant, a motorman running an electric passenger train from Wilmington to Wrightsville Beach, and was killed in a head-on collision (died the next morning) with a baggage or garbage car of defendant, operated by one Ed Allen, on the trestle between Harbor Island and Wrightsville Station, about 6:30 o'clock on the morning of 25 August, 1920.

In *Kinney v. R. R.*, 122 N. C., 964, it is said: "That two passenger trains in open daylight should come together with such terrific force is evidence of negligence. If the doctrine of *res ipsa loquitur* ever applies, it would certainly do so in such a case. . . . This was peculiarly a case for the jury."

We think the court below in the charge stated the law correctly. "It is the law in North Carolina that where it has been proved or is admitted that the death of an employee of a railroad is the result of a head-on collision in the daytime, the law itself raises a presumption

that the death was caused by the negligence of the defendant. That presumption, however, is not an irrebuttable presumption. It is a presumption which may be rebutted by the facts and circumstances as they appear in the evidence, if the jury find that the facts and circumstances actually do rebut that presumption which arises by law. The fact that there was a head-on collision between two trains in the daytime makes what the law calls a *prima facie* case, from which the plaintiff would be entitled to recover if nothing else appeared." *McDowell v. R. R.,* 186 N. C., 571; *Saunders v. R. R.,* 185 N. C., 290; *Harris v. Mangum,* 183 N. C., 235; *White v. Hines,* 182 N. C., 288; *R. R. v. R. R.,* 157 N. C., 369; *Hemphill v. Lumber Co.,* 141 N. C., 488; *Stewart v. R. R., supra,* 689; *Wright v. R. R.,* 127 N. C., 229. This doctrine is fully discussed in 4 Labatt's Master and Servant (2 ed.), sec. 1601. See note 10.

We do not think that defendant can complain. The court below, at the request of the defendant, gave the following instruction: "As a general rule, injury to passengers or employees from a collision by a common carrier gives rise to *prima facie* evidence of negligence. The doctrine or principle of *res ipsa loquitur*—that is a Latin expression, meaning the thing speaks for itself—applies, but this only means that proof, or admission, of the collision warrants the inference of negligence—that is, it furnishes circumstantial evidence of negligence to be weighed, not necessarily to be accepted as sufficient; it calls for explanation or rebuttal, not necessarily that it requires it. It makes a case to be decided by the jury, but not such a case as forestalls the verdict. So here the plaintiff having charged, and the defendant having admitted, that the injury to plaintiff's intestate was caused by a collision between the car which was driven by plaintiff's intestate and the car operated by Allen, that is evidence from which the jury might infer—if they felt that the evidence justifies it—that the defendant was guilty of negligence, if nothing else appears. But if the circumstances of the collision are shown, and from these circumstances it appears that the injury was caused, not by the defendant, but by the negligent act of the plaintiff's intestate himself, then the *prima facie* case arising from the collision is rebutted, and the jury should answer the first issue 'No.' The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case, which entitles him to a favorable finding, unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged; the doctrine of *res ipsa loquitur* would then have no application."

On the question of negligence and proximate cause, the court below charged the jury as follows: "The question is: Was the plaintiff's intestate killed by the negligence of the defendant? Before the plaintiff can recover in this action, you must find by the greater weight of the evidence not only that he was injured and died from the result of the injury, but that he was injured by the negligence of the defendant. Negligence is the failure to do that which a reasonably prudent man would have done under the circumstances, or the omission to use means reasonably necessary to avoid or prevent injury to others. In this case, in order for the plaintiff to recover, you must also find that defendant is guilty of what the law classes actionable negligence—that is, negligence which entitles the plaintiff to recover in court; and to establish actionable negligence, the plaintiff is required to show by the greater weight of the evidence that there was failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed; proper care being that degree of care which a prudent man would exercise under like circumstances and charged with a like duty. You will also have to find by the greater weight of the evidence that such negligent breach of duty was the proximate cause, or one of the contributing proximate causes of the injury which resulted in the death of plaintiff's intestate—that is, the cause which produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence would have foreseen that some such result was probable under all the facts as they existed. You not only have to find that the injury was the result of negligence upon the part of the defendant, but you have to go further and find that that negligence was the proximate cause or one of the proximate causes of plaintiff's intestate's death. In a case of this character there may be one proximate cause of the injury, or there may be more than one. There may be an indefinite number of causes which resulted in the death which are proximate causes, and it is for you to say, when you come to this question, whether or not you find that the defendant was guilty of negligence in occasioning this injury, and if such negligence was the proximate cause or any one of the contributing proximate causes of his death. Proximate cause is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which the event would not have occurred. That is the legal definition of proximate cause." We think the charge, under the facts and circumstances of the case, is in accord with the decisions of this Court. *Drum v. Miller,* 135 N. C., 215; *Ramsbottom v. R. R., supra; Fisher v. New Bern,* 140 N. C., 512; *Harton v. Telephone Co.,* 141 N. C., 455; *Ward v. R. R.,* 161 N. C., 184; *Paul v. R. R.,* 170

N. C., 231; *Taylor v. Lumber Co., supra,* 116-117; *Lea v. Utilities Co.,* 175 N. C., 464; *Stultz v. Thomas,* 182 N. C., 473; 29 Cyc., pp. 415-488.

The plaintiff contends in his argument that "The defendant admits in its answer that a coemployee of Hinnant was talking to him and distracting his attention from the garbage car. This is admitted in the pleadings, and being so established, if found to be one of the contributing proximate causes, liability follows. We say, as a matter of law, this fact being that the plaintiff was entitled to have the court instruct the jury, if they believed the evidence, to answer the first issue 'Yes.' "

On the other hand, the defendant contends: "The defense was founded chiefly on the proposition that, even though the defendant might have been guilty of negligence, in that its employee, Mr. Allen, had the baggage car on the trestle, which negligence was and is denied, the intestate of the plaintiff was guilty of the only proximate negligence, in that, in violation of the plain rules of the company, he went out of a double track, where he was perfectly safe, at Wrightsville Station, on the mainland, on a bright morning in August, at about 6 o'clock, when there was nothing to obscure his vision, and ran into the baggage car, which, according to defendant's testimony, had stopped, and, before and after stopping, had been given sharp warnings to attract Hinnant's attention, which for some unknown reason could not be done, though he was neither deaf nor blind."

In the second position taken in its brief the defendant, to sustain this contention, assigns as error the following charge given by the court below—given at the request of plaintiff (twenty-fourth assignment of error), and the refusal to give instructions prayed for by defendant (twenty-sixth and twenty-seventh assignments of error). The charge given at the request of plaintiff is as follows: "If the jury should find from the evidence, by its greater weight, that the train or cars upon which the deceased was motorman was given or had the right of way over the track at the time of the collision, and that the defendant ran, or caused to be run, one of its cars out upon the track in front of the train upon which plaintiff's intestate was motorman, and at a time when the plaintiff's intestate's train, upon which he was motorman, had such right of way, and that such fact was one of the contributing proximate causes of the plaintiff's intestate's being killed, then the jury should answer the first issue 'Yes,' even though they should find from the evidence that had the plaintiff's intestate, had he kept a proper lookout and performed his duty, he could have stopped his train and prevented the collision; for if the train upon which the plaintiff's intestate was motorman had the right of way over the track, and if the defendant company, after giving said train the right of way over the track, ran or permitted a car to be out on the track, in the way of

plaintiff's intestate's train, and kept it there until the collision occurred, resulting in the death of the plaintiff's intestate, such would be an act of negligence on the part of the defendant, and if proximate cause of the injury, and you find so by the greater weight of the evidence, then the jury would answer the first issue 'Yes.'"

The instructions prayed for by defendant, and refused, are as follows: "Even though the jury should find from the evidence and the greater weight thereof—the burden of proof being upon the plaintiff to satisfy you—that the company was negligent in any respect in Allen's baggage car being on the trestle, yet it was the motorman's—that was Hinnant's—duty not to go out of the double track onto the single track, in face of the approaching baggage car, which he saw, or by using proper care, should have seen; and if you find by the evidence and its greater weight that Hinnant did see the approaching car, by the exercise of reasonable care, would have seen it in time not to go out of the double track onto the single track on the trestle, or to stop his car after he had gone out on the single track in time to avoid the collision, you will answer the first issue 'No.'"

The position taken by the defendant is that the plaintiff's intestate was guilty of negligence, which was the *only and sole proximate cause of the injury,* and that the jury should have answered the first issue "No."

The argument and reasoning has much to commend itself, but is not applicable in a case like the instant one. We have a statute in this State that applies to cases of this kind—common carrier by railroad. A part of C. S., 3467, *supra,* says: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," etc. With that statute in force in this State, plaintiff's intestate went out of the double track onto the single track on the trestle, and by keeping a proper lookout could have stopped his train and prevented the collision. This would make him guilty of contributory negligence, yet if his train had the right of way over the track, and defendant blocked it with the garbage train, and this was the proximate cause or one of the contributing proximate causes of the injury, and continuing up to the time of the collision, and the jury so find, the defendant would be guilty of negligence, and the jury should answer the issue "Yes."

The principle of *Davies v. Mann,* 12 M. & W., 546, and that line of cases cited by defendant's counsel, cannot be applied to this case. The common law as to "common carriers" has been changed by statute. Our statute is similar in many respects to the Federal Employers' Liability Act. In the argument on the passage of this act, Senator Smith, of

Michigan, said: "It suggests the very anomalous situation that a passenger pays his fare, and if he contributes to his own injury he cannot recover, while two employees paid to conduct him safely may by their negligence cause an accident and kill many persons, and yet they can recover." 60 Cong. Record (first session), p. 4435.

The present right of recovery is well stated by Thornton in his book on "The Employers' Liability and Safety Appliance Acts," sec. 28: "A careful reading of this section (Federal Employers' Liability Act) will show that contributory negligence is no longer a complete defense, as it was at the common law, but is still a partial defense. As a complete defense, all the rules of the common law are erased at one sweep of the legislative pen; and, although an employee is guilty of contributory negligence, he may still recover. But those rules are still in force for the purpose of determining the *quantum* of damages the employee may recover; for whatever at common law was contributory negligence is still to be considered in determining the relative amount of the employee's negligence, as compared with that of the employer." Note 4 is as follows: "The statute 'permits a recovery by an employee for an injury caused by the negligence of a coemployee; nor is such a recovery barred, even though the injured one contributed by his own negligence to his injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires each to bear the burden thereof.' 60 Cong. Rec. (first session), p. 4434."

The case of *Frese v. Chicago, B. & Q. R. R. Co.*, in U. S. Supreme Court, decided 15 October, 1923, is not applicable to the case at bar. This was a collision of a railroad train approaching a crossing with another railroad upon the same level. Frese was an engineer in charge of the engine of the defendant, Chicago, Burlington and Quincy Railroad Company. His train had a collision with the train of the Wabash Railroad Company at a grade crossing. The collision was in Illinois. The statute of Illinois requires a train approaching a crossing with another to come to a full stop 800 feet from the crossing. Frese stopped his train about 200 feet and the Wabash train about 300 feet from the crossing. The statute further provides: "The engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the (bridge) or crossing." *Mr. Justice Holmes* said: "Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act to hold that he

could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more." In the *Frese case* the deceased was killed, and the injury was not by a train on the Chicago, Burlington and Quincy Railroad Company, by whom he was employed, but he was killed by a train on the Wabash road. The negligence of the Wabash road was not the negligence of a coemployee of deceased. There was no sufficient evidence of negligence shown on the part of the fireman and coemployee of Frese for the jury to consider.

In the instant case there was sufficient evidence of negligence on the part of defendant to be submitted to the jury under our statute. The Illinois statute says the engineer "shall positively ascertain that the way is clear."

The act of defendant in blocking its track was one of continuing negligence when coupled with the continuing order from the company to proceed over the track, and when it failed to advise him, which it might have done while at Wrightsville Station, that the track was blocked, and in not revoking the existing order allowing plaintiff's intestate a superior right of way over the track, it was negligent. There was evidence to go to the jury on this phase of the case.

It has been frequently held in this State that there can be more than one contributing proximate cause. "Where two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable." *White v. Realty Co.,* 182 N. C., 538, and cases cited.

It was in evidence—the weight was for the jury—that the act of defendant in blocking the track with another train, and in requiring its employee to operate them in violation of its own rules, and a coemployee was distracting Hinnant's attention from his duties, and in failing to give adequate and efficient meeting points, and Allen's failure to reverse his car, were each of them acts of negligence tending to show the company's liability, at least under our statutory Employers' Liability Act. *Greenlee v. R. R.,* 122 N. C., 977; *Fleming v. R. R.,* 131 N. C., 476; *Walker v. R. R.,* 135 N. C., 738; *Smith v. Electric R. R.,* 173 N. C., 489; *Hines v. Lumber Co.,* 174 N. C., 294.

In 18 R. C. L., p. 670, it is said:

"163. *Disobedience of Rules of Company.* In order to protect the life and property of the public, as well as for the protection of employees, it is highly important that those who engage in railroad service should observe the rules and regulations of the company, and the courts have considered it politic to deny to an employee the right to recover for personal injuries to which his disobedience of a reasonable rule or regulation of the company appears to have contributed. To be binding,

however, rules must have been properly promulgated; *and of course they must have been applicable to the facts of the particular case, and not abrogated or revoked by other inconsistent rules or orders.*" (Italics ours.) *Mason v. R. R.*, 111 N. C., 482; *Haynes v. R. R.*, 143 N. C., 154; *Tisdale v. Tanning Co.*, 185 N. C., 501; *Belshe v. R. R.*, 186 N. C., 246.

The jury found on the second issue that the plaintiff's intestate was guilty of contributory negligence. On the issue as to the measure of damages the court below took this in consideration and in the charge to the jury on this issue followed the rule laid down in *Ward v. R. R.*, 161 N. C., 186.

The evidence for plaintiff and defendant was conflicting. The case was tried out, in accordance with the allegations and contentions in the statement of this case, before set out. Reciting the rules of the company, which each side relied on, and the evidence, would only make a lengthier record. We have examined the assignments of error carefully, and can find no prejudicial or reversible error.

No error.

STACY, J., took no part in the consideration or decision of this case.

STATE v. J. H. HIGHTOWER.

(Filed 27 February, 1924.)

1. Criminal Law—Banks and Banking—Insolvency—Deposits—Statutes.

In order for a conviction under the provisions of section 85, chapter 4, Public Laws 1921, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts.

2. Evidence—Witnesses—Expert Opinion—Cross-Examination.

Where an expert witness has given his testimony upon evidence he obtained as a result of his personal investigation, it is not reversible error to admit his opinion thereon without first requiring him to state the evidence upon which it is hypothecated, under the modern doctrine, for these are matters to be brought out on cross-examination.

3. Same—Opinion Evidence Upon the Issues.

An expert witness may not invade the province of the jury by testifying to his opinion upon an issue of facts to be determined by the jury upon the evidence on the trial.

4. Same—Appeal and Error.

It is reversible error to deny the defendant the right of cross-examination of an expert witness, whose testimony, in an action for the commission of a felony, has been received against him upon the trial, or to introduce evidence tending to disprove the facts upon which the expert opinions were based.

5. Same—Banks and Banking—Officers—Deposits—Insolvency.

In an action to convict an officer of a bank for receiving or permitting an employee to receive deposits at a time he knew of the insolvency of a State bank (chapter 4, Public Laws 1921), the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency.

6. Same—Knowledge.

In an action to convict under chapter 4, Public Laws 1921, an officer of a bank for receiving, etc., deposits therein at a time he knew of its insolvency, the question as to his knowledge is ordinarily to be determined with reference to a variety of facts and circumstances, and in defense it is permitted him to go into an investigation of the assets and property of the bank at the date of the deposits, and their value at that time or thereafter, when bearing upon their worth at the time they were charged to have been unlawfully received.

7. Same.

Where the defendant is tried as an officer of a bank for unlawfully receiving deposits of the bank, or permitting them to be received, in violation of chapter 4, Public Laws 1921, and the State Bank Examiner and another expert have been permitted to give their testimony as to its insolvency at the time upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts.

8. Criminal Law — Evidence — Opinions — Witnesses — Constitutional Law—Trial by Jury—Prejudicial Error.

The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by our Constitution, Art. I, sec. 17, and a denial thereof may not be held as merely a technicality and harmless; nor is this error cured by the fact that he has had an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other witness is to be regarded as the most important one.

9. Criminal Law—Banks and Banking—Solvency—Deposits—Due Course of Business.

The word "insolvent," in the statute making it a felony for an officer of the bank, etc., to receive deposits therein with knowledge of its insolvency, means when the bank cannot meet its depositary liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the same time on demand. Chapter 4, section 31, Public Laws 1921.

CLARKSON, J., dissenting; CLARK, C. J., concurring in dissenting opinion.

STATE *v.* HIGHTOWER.

APPEAL by defendant from *Cranmer, J.,* at June Term, 1923, of WAKE.

Criminal prosecution, tried upon an indictment charging the defendant and one H. H. Massey, president and cashier, respectively, of the Central Bank and Trust Company, a banking institution located in the city of Raleigh, N. C., with wilfully and feloniously receiving money, checks, drafts or other property as deposits in said Central Bank and Trust Company on 13 January, 1922, when they and each of them had knowledge of the fact that such banking institution was insolvent and unable to meet its depositary liabilities as they become due in the regular course of business, in violation of chapter 4, section 85, Public Laws 1921.

The jury acquitted the defendant H. H. Massey and convicted the defendant J. H. Hightower. From a judgment sentencing the defendant Hightower to an indeterminate imprisonment in the State's Prison of not less than two and one-half years and not more than four years, as provided by C. S., 7738, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Willis Smith and Charles U. Harris for defendant.

STACY, J. The pertinent provisions of the statute, under which the present indictment is laid, are as follows:

"Sec. 85. *Insolvent banks, receiving deposits in.* Any person, being an officer or employee of a bank, who receives, or, being an officer thereof, permits an employee to receive money, checks, drafts or other property as a deposit therein, when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned in the State's Prison not more than five years, or both." Chapter 4, Public Laws 1921.

In the first section of said act, so far as now applicable, the term "insolvency" is defined to mean: (a) "when a bank cannot meet its depositary liabilities as they become due in the regular course of business"; and (b) "when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors." The remaining definition of said term, as contained in the statute, is not material for present purposes. The evidence relates only to the ones just given.

In order to obtain a conviction under the provisions of this statute, it may be observed *in limine,* the State must prove beyond a reasonable doubt: (1) that the deposits described in the bill of indictment were actually received; (2) that the bank in question was insolvent at the

time the alleged deposits were received therein, and (3) that the defendant, officer or employee of the bank, received, or such officer thereof permitted an employee to receive, said deposits, with knowledge, at the time, of the insolvency of such bank. These are the essential elements of the offense condemned by the statute, and which is denominated a felony therein.

The principal evidence offered by the State, of which the defendant first complains, is that of Clarence Latham, State Bank Examiner, and W. S. Coursey, an expert accountant, or "auditor employed by the banking department to make an audit of the bank" (defendant's brief), to the effect that, in the opinion of said witnesses, the Central Bank and Trust Company was insolvent on 13 January, 1922, the day on which it is alleged the defendant, as president of said banking institution, received certain deposits therein, with knowledge at the time that such banking institution was then insolvent. These opinions were based upon an examination and investigation of the affairs of the bank, made by the two witnesses in the discharge of their official duties. The competency of this evidence is assailed upon two grounds:

First. It is challenged because, it is alleged, the witnesses were allowed to express their opinions upon one of the essential facts necessary to constitute the offense charged, and which the jury alone was impaneled to decide. "Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing those conclusions of law or fact upon which the decision of the case depends," says *Fuller, J.*, in *S. v. Stevens,* 16 S. D., p. 317, a case dealing with the insolvency of a bank. And, speaking to a similar question, in *People v. Paisley,* 288 Ill., 310, *Duncan, J.*, says: "No witness can thus invade the province of the jury, expert or otherwise." See, also, *S. v. Myers,* 54 Kan., 206; *Ellis v. State,* 138 Wis., 513.

Second. It is questioned because, as a prerequisite to the expression of such opinions, the witnesses were not required to state the facts upon which they based their conclusions. In *White v. Bailey,* 10 Mich., 155, *Campbell, J.*, says that no witness, expert or other, should be allowed to give in evidence an opinion on one of the essential facts to be shown, unless he first state the foundation or basis of his opinion. "This is necessary for two reasons: First, it is necessary, in order to enable other experts to determine whether the opinions expressed by the witness are correct, and to enable the parties to contradict them, if wrong. Second, it is necessary, in order that, if an opinion is given on a mistaken or perverted statement of facts, the truth may be elicited from others to destroy the foundation of the conclusions. And a third reason might be mentioned, which is, that the court and jury may know, from his oppor-

tunities, what means the witness had of forming any opinion at all. These are rudimentary principles, which cannot safely be departed from."

We have cited some of the authorities, probably the strongest ones, which tend to support the defendant in his position on the two grounds stated above. But the decisions elsewhere are not all one way. They are in sharp conflict. The precise question now raised apparently is presented for the first time in this jurisdiction—certainly for the first time under the present statute. In the light of the instant record, we think the defendant's initial class of objections to the admission of the opinion evidence of the witnesses, Latham and Coursey, must be overruled on both grounds. These witnesses, the one a State bank examiner and the other an auditor employed by the State Banking Department, it is conceded, possess special skill for interpreting or drawing inferences from observed data of their own, or from observed data furnished by others, and their conclusions or opinions purport to be based upon an examination or investigation of the subject-matter about which they undertake to speak. "To warrant its introduction" (expert opinion evidence), says *Earl, J.*, in *Ferguson v. Hubbell,* 97 N. Y., p. 513, "the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have." And to like effect is the language of *Beck, C. J.*, in *Hamilton v. R. R. Co.,* 36 Iowa, p. 36: "Every employment requires a degree of skill, and there is none in which a degree of proficiency may not be obtained by practice. This fact is no ground for the admission in evidence of the opinions of men engaged in every pursuit in regard to matters pertaining thereto. The pursuit in which the witness claims to be an expert must be one of science, skill, trade, or the like; these things pertain to the pursuit, and opinions of those proficient therein may be heard. But one skillful in pursuits not of this character may not give an opinion. The pursuit itself must be considered in determining who may be examined as experts."

The business of examining banks undoubtedly falls within the classification of trades or pursuits, requiring special skill or knowledge, and hence one versed in its intricacies, we apprehend, should be permitted to speak as an expert. It is not questioned, on the instant record, but that the two witnesses offered by the State are competent to speak as experts in their field or in their line of work.

Mere opinion evidence was wholly rejected by the early English courts as being insufficient to support an absolute judgment or to hold a witness for perjury. Hence it was not received as evidence at all.

"It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself,'" was the reason assigned for its exclusion by Coke. And in *S. v. Allen,* 8 N. C., p. 9, *Henderson, J.,* said: "The law requires that he who deposes to a fact should have the means of knowing it. Grounds of conjecture and opinions are not sufficient." But the law in this respect has been the subject of considerable growth and development, both in England and in this country. The history of this development, beginning with its original exclusion and leading up to the admission of such evidence, with illustrations from the decisions of the courts, is given by Wigmore in his valuable work on the subject of Evidence. In this connection he refers to the practice of admitting opinion evidence by experts based upon observation or investigation, and concludes that such evidence by experts of conceded skill and experience may be received without in the first instance necessarily requiring the facts observed or discovered to be stated to the court and jury, such disclosures being more properly a matter for cross-examination. We quote from section 1922:

"It has already been seen, in reviewing the history of the doctrine, that in the beginning the disparagement of opinion rested on grounds totally different from those now received. It was objected to because, as a mere guess, the belief of one having no good grounds, it lacked the testimonial qualification of observation; hence, a *mere* opinion, as soon as it appeared to be such, must be rejected. In a few jurisdictions the modern doctrine has been confused with the earlier one, and it is laid down as a general rule that opinions must be accompanied with the facts on which they are based—usually with the exception that expert witnesses are exempted from this rule.

"Now, in no respect is this rule sound. In the first place, then, there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inferences from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination. Any other rule cumbers seriously the examination, and amounts in effect to changing substantially the whole examination into a *voir dire* — an innovation on established methods which is unwarranted by policy."

He further says (section 675): "All opinions or conclusions are in a sense hypothetical. But does it follow that, when the opinion comes from *the same witness* who has learned the premises by actual observation, those premises must be stated beforehand, hypothetically or otherwise, by him or to him? For example, the physician is asked, 'Did you examine the body?' 'Yes.' 'State your opinion of the cause of death.'

Is it here necessary that he should first state in detail the facts of his personal observation, as premises, before he can give his opinion? In academic nicety, yes; practically, no; and for the simple reason that on cross-examination each and every detail of the appearances he observed will be brought out, and thus associated with his general conclusion as the grounds for it, and the tribunal will understand that the rejection of these data will destroy the validity of his opinion. In the opposite case, where the witness has not had personal observation of the premises, they are not to be got from him on cross-examination, because he had no data of personal observation; and that is precisely the reason why they must be indicated and set out in the question to him, for thus only can the premises be clearly associated with the conclusion based upon them.

"Through failure to perceive this limitation, courts have sometimes sanctioned the requirement of an advance hypothetical statement even where the expert witness speaks from personal observation."

We are disposed to adopt the conclusions reached by Mr. Wigmore in his work on Evidence, though the numerical weight of authority may be otherwise, and a very satisfactory statement of what we conceive the law to be will be found in *People v. Youngs,* 151 N. Y., p. 218. There, opinion evidence of experts was received without first requiring the observations upon which such opinions were based to be given in evidence. This was affirmed on appeal, it being the subject of exception, and the reviewing Court, speaking to the question, said:

"It appears by the record that certain medical experts were called as witnesses by the prosecution, who testified that they had made a personal examination of the defendant with reference to his sanity, and were then asked whether in their opinion he was sane at the time of such examination. These questions were objected to by the defense as incompetent, but the objection was overruled, and there was an exception. It is now urged that these experts should not have been permitted to express an opinion without first stating the facts upon which such opinion was based. The testimony of experts is an exception to the general rule, which requires that the witness must state facts and not express opinions. In such cases the opinion of the witness may be based upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury, and it is because the facts are of such a character that they cannot be weighed or understood by the jury that the witness is permitted to give an opinion as to what they do or do not indicate. In such cases it is the opinion of the witness that is supposed to possess peculiar value for the information of the jury. Of course, all the facts or symptoms upon which the opinion is based may be drawn out also,

either upon the direct or cross-examinations. It is undoubtedly the better practice to require the witness to state the circumstances of his examination, and the facts, symptoms or indications upon which his conclusion is based, before giving the opinion to the jury. But we think that it is not legal error to permit a medical expert, who has made a personal examination of a patient for the purpose of determining his mental condition, to give his opinion as to that condition at the time of the examination, without in the first instance disclosing the particular facts upon which the opinion is based. The party calling the witness may undoubtedly prove the facts upon which the opinion is based, and, as we have already observed, that is doubtless the safer practice. It may also be true that the court, in the exercise of a sound discretion, may require the witness to state the facts before expressing the opinion, and in all cases the opposite party has the right to elicit the facts upon cross-examination. But the precise question here is whether the court committed an error in permitting the witness to give the opinion before the facts upon which it was founded were all disclosed, and we think that when it is shown that a medical expert has made the proper professional examination of the patient in order to ascertain the existence of some physical or mental disease, he is then qualified to express an opinion on the subject, though he may not yet have stated the scientific facts or external symptoms upon which it is based."

Applying these principles to the instant case, we think the better practice would have been for Latham and Coursey to have stated the facts or to have detailed the data observed or discovered by them, before drawing their conclusions or giving their opinions in evidence, but we shall not hold it for legal or reversible error that such was not required as a condition precedent to the admission of their opinions in evidence before the jury. *S. v. Felter,* 25 Ia., 75; *S. v. Foote,* 58 S. C., 218. Speaking to a similar question, in *Commission v. Johnson,* 188 Mass., p. 385, *Bradley, J.;* said: "By this form of examination no injustice is done, for whatever reasons, even to the smallest details, that an expert may have for his opinion can be brought out fully by cross-examination."

This brings us, then, to a consideration of the defendant's second class of exceptions. On the cross-examination of the State's expert witnesses the defendant sought to show that certain notes of J. H. Hightower and H. H. Massey, the amusement company, and Mrs. C. M. Hightower, which had been listed as bad or doubtful assets, when traced back to their original entries on the books of the bank, disclosed the fact that all of these notes were substituted for notes and obligations of R. G. Allen, the former president of said bank, and that the consideration for the substitution was the transfer by Allen to Hightower and Massey, the

Amusement Company and Mrs. Hightower all of his holdings and interests in the bank building, the Superba Theater and the stock which he owned in the building, and that this consideration represented value sufficient to liquidate all of said notes.

The defendant further sought to show by the cross-examination of said witnesses that this transferred interest was delivered to the receivers of the bank, and by them in turn sold and conveyed to R. G. Allen upon the consideration that he pay or secure the payment of all these notes and obligations, in addition to other notes and obligations owing by him to the bank at the time of its closing; that this transaction finally secured the payment of all such notes, which at first the witnesses considered as bad or doubtful, and upon which they formed their opinions as to the insolvency of the bank; and that at all times the defendant knew of these assets behind said notes, and had reasonable ground to believe the bank to be solvent. Its insolvency was not apparent from the face of the records of the bank.

The court refused to admit any evidence relating to these transactions, and ruled that only the condition of the bank on 13 January, 1922, was to be inquired into, and that the sole question to be considered was whether or not the bank was solvent on that day. We think this ruling was erroneous and entitles the defendant to a new trial. One of the chief reasons assigned for allowing expert witnesses to give in evidence their opinions, formed from observations or investigations, without a statement of the facts upon which they are based, is that the foundation of such opinions may be fully inquired into on the cross-examination. But when this is denied, the defendant is clearly disadvantageously circumstanced before the jury. If the State is to be given the benefit of such opinions as evidence, the defendant must be allowed an opportunity to attack them, or to challenge their value and probative force.

Again, the alleged insolvency of the bank on 13 January, 1922, was not the only question to be considered, but it was further essential to inquire as to whether the defendant, president of said bank, received therein deposits, or permitted an employee to receive therein deposits, with knowledge at the time of the insolvency of such bank. The receipt of the deposits is conceded, but all knowledge of insolvency is denied. The excluded evidence was not only competent as bearing upon the alleged insolvency of the bank, but it was also material upon the question of the defendant's knowledge of such insolvency.

The word "knowledge," as used in the statute, we apprehend, is to be taken in its ordinary sense and according to its usual significance or acceptation. It means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circum-

stances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it. *Parrish v. Commission,* 136 Ky., p. 99.

For the purpose of ascertaining the solvency or insolvency of a bank, it is permissible to go into an investigation of its assets and property—and these words include every species of property owned by the bank—as of the date when the deposit is made, and, of course, their value after that, or at the time of the trial, is competent as illustrating or bearing upon their worth at the time charged in the bill of indictment. *Parrish v. Commission, supra.*

But it is contended that, notwithstanding the above ruling, the defendant was subsequently allowed the privilege of cross-examining the witness Coursey in regard to the matters originally excluded, and that for all practical purposes this evidence was before the jury. Even if this be so, it could hardly be said that a cross-examination of the witness Coursey would suffice for a cross-examination of Latham, as witness the following questions propounded to the State Bank Examiner and excluded on objection:

"Q. If you had had the same information on 13 January that you now have, would you say the bank was solvent or insolvent?

"A. That goes into another question as to the value of the assets.

"Q. On 13 January the assets as they appeared on the books?"

"Objection by State; sustained; exception."

Furthermore, in the charge no mention is made of the assets back of these alleged worthless or doubtful notes, and the jury is apparently limited to a consideration of the State's unimpeached or unquestioned opinion evidence. It would be stretching the doctrine of harmless error to an unwholesome degree to say that the jury heard and properly considered evidence which was held to be incompetent, excluded on the cross-examination of the most important witness and disregarded by the court.

But it is earnestly insisted that the present conviction should be sustained because it appears from the facts of record that the Central Bank and Trust Company was clearly insolvent on 13 January, 1922, and that the defendant must have known it. These, it should be remembered, are mooted questions of fact for the jury, and not for this Court. The defendant controverts them, and they are by no means admitted. To say that a judgment of conviction must be upheld where the defendant's case has been erroneously tried, because the record discloses an inference of guilt, is, in effect, to say that the inference is so strong as not to entitle the defendant to a jury trial at all—a proposition the bare

statement of which refutes itself. It is the duty of the courts to keep strict watch over fundamental rights, and to protect them in all matters presented for consideration. Those who administer the law must not forget that decided cases make precedents — precedents sometimes of little moment in themselves, but which, in their accumulated power, may in some emergency overturn basic principles and subvert the rights of those intended to be protected. *S. v. Holt,* 90 N. C., p. 753. A distinguished judge and law-writer, in commenting upon the excellence of trial by jury, thus points out in substance the danger to which we now advert:

"So that, the liberties of the people cannot but subsist so long as this palladium remains sacred and inviolable, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it by introducing new arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And, however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the form of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedents may gradually increase and spread, to the utter disuse of justice, in questions of the most momentous concern." 4 Bl. Com., 350.

This right of trial by jury, says *Judge Story,* is justly dear to the American people; it has ever been esteemed by them as a privilege of the highest and most beneficial nature. *S. v. Hart,* 186 N. C., p. 589.

Again, it is urged that the errors assigned by the defendant are rather technical, minute and attenuated, but we do not so understand the record. "A fair and full cross-examination of a witness upon the subject of his examination-in-chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error." *Sanborn, J.,* in *Mining Co. v. Mining Co.,* 129 Fed., 668. In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the State's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, sec. 11. "We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may

be confronted; that is, put face to face." *Pearson, C. J.,* in *S. v. Thomas,* 64 N. C., 74. And this, of course, includes the right of cross-examination. It is fundamental with us, and expressly vouchsafed in the bill of rights that no man shall be "deprived of his life, liberty, or property but by the law of the land." Constitution, Art. I, sec. 17.

As the case goes back for another hearing, it may not be amiss to observe that the trial court charged the jury, in the language of the statute, "the term 'insolvency' means when a bank cannot meet its depositary liabilities as they come due in the regular course of business," and refused to instruct them that the real test was whether the fair market value of the assets of the bank on the particular day in question was sufficient to cover its liabilities, and to pay depositors within a reasonable time, in the ordinary course of business, as is usually expected or required of banks.

The witness Coursey testified that, in his opinion, the bank was insolvent on the day named, but he also said that he did not know what was meant by "not being able to meet its depositary liabilities as they become due in the regular course of business." This he considered a relative phrase, the meaning of which was to be determined by the law of averages among banks of similar size. Inability to meet depositary liabilities "as they become due in the regular course of business" evidently does not mean a condition in which the bank could not pay all of its depositors on demand. If this be the meaning of "insolvency" under the statute, then probably every banking institution in the State is insolvent, for doubtless no one of them could presently pay all of its depositors in full. It is a matter of common knowledge that every well-managed bank seldom, if ever, has on hand an amount of money equal to its depositary liabilities. It is not expected to do so, nor is it required to anticipate that all of its depositors will want their money on the same day or at the same time. It is a legitimate feature of good banking to lend out so much of the deposits as may not be necessary to meet the demands of depositors in the ordinary and regular course of business. Such is expressly sanctioned by the statute. Section 31 provides: *"Reserve.* Every bank shall at all times have on hand or on deposit with approved reserved depositories instantly available funds in an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits and five per cent of the aggregate amount of its time deposits. But no reserve shall be required on deposits secured by a deposit of United States bonds or the bonds of the State of North Carolina."

The statute permitting, as it does, a bank to lend out such a large amount of its deposits, it would be unreasonable to say that it must be ready at all times to pay its entire depositary liabilities on demand.

Speaking to this question in *Parrish v. Commission, supra, Carroll, J.,* said: "Although the law undoubtedly contemplates that when a depositor places money in a bank as a general deposit, he shall have the right to withdraw it upon demand, and that the refusal or inability of the bank to permit him so to do would be evidence of its failing condition, it is yet manifest that the mere fact that the bank does not have in its vaults sufficient cash to satisfy all its depositors, or any considerable number of them, on the same day, or in case a run was made on the bank, would not be proof of its insolvency within the meaning of the statute. A bank might not be able to pay its depositors on demand, and yet be perfectly solvent."

The inability to meet depositary liabilities as they become due *in the regular course of business,* with knowledge thereof, is the point fixed by the statute beyond which the proprietors of a bank may not continue to receive deposits therein with safety to themselves. This does not mean that the officers of a bank may not persist prudently and wisely in an effort to avert a financial disaster or to tide over a temporary embarrassment, such as may arise in a time of money stringency, but it does mean that criminality will attach under the statute when any such officer or employee receives, or when any such officer permits an employee to receive, deposits therein with knowledge of the fact that, by reason of the bank's insolvency, such deposits, then being received, are taken at the expense or certain hazard of the depositors presently making them. The officers of a bank are not only trustees for the stockholders, but they are also trustees for the patrons of the bank. It is a matter of common knowledge that liquidation of a bank in insolvency proceedings is usually attended with considerable loss and depreciation of the value of its assets. So, when a banker stands face to face with a condition of probable or apparent inability to meet depositary liabilities "as they become due in the regular course of business," he knows that to go into liquidation, unless such be absolutely necessary, is inviting a greater disaster for both stockholder and depositor than to persist in going on.

Premature or unnecessary suspension is often the very worst thing that could happen to all concerned, and especially to those intended to be protected by the statute. It is necessary, therefore, and we understand such to be the purpose of the law, for officers of a bank to be permitted to exercise some judgment in determining when deposits are no longer to be received therein because of probable or apparent inability to meet depositary liabilities as they become due in the regular course of business. To hold otherwise would be to establish a rule at once hazardous to the banking business and perilous to the depositing public, and we think at variance with the intent of the Legislature.

To require a bank to close its doors because of inability to pay depositors on demand, and not "as they become due in the regular course of business" or as a matter of right, would make the fabled position of doubly unfortunate peril most real—the banker while bending all of his energies to avoid the danger of closing, on the one hand, would be quite likely to fall into a still greater danger for himself, on the other, by drifting into the shades of prison walls. *Ellis v. State,* 138 Wis., 513. But when any officer or employee of a bank receives, or, being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein, when he has knowledge that such bank is insolvent, he comes within the condemnation of the statute and must be held answerable for such conduct in a criminal prosecution. The statute was designed to protect the depositing public against this kind of practice on the part of officers and employees of banks, and they will be held to a strict accountability under its provisions when they receive or when any such officer permits an employee to receive deposits therein with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received are taken at the expense or certain peril of the depositors presently making them.

The statute must be given a reasonable construction, and it is possible that on the next trial the evidence may be such as to call for a more extended definition of "insolvency" than that contained in the statute. But we will not anticipate what questions may arise upon a full disclosure of the evidence.

Realizing the importance of this case to the banking interests of the State, as well as to the depositing public, we have given the record a most searching and critical examination. From this we are convinced that, in the interest of a fair and impartial trial, the cause must be remanded for another hearing. It is so ordered.

New trial.

CLARKSON, J., dissenting: The defendant, J. H. Hightower, the president of the Central Bank & Trust Co., was indicted with H. H. Massey, the cashier, on the charge that on 13 January, 1922, they "did unlawfully, wilfully and feloniously, as officers of said bank, receive, for and in behalf of said bank, money, checks, drafts and other property as deposits therein when they and each of them had knowledge that said bank was then and there insolvent."

The verdict of the jury was: "Said jurors for their verdict say that the defendant, the said H. H. Massey, is not guilty. . . . The jurors for their verdict further say that the defendant J. H. Hightower is guilty, but recommend the defendant to the mercy of the court."

The jurors tempered justice with mercy, and I believe their verdict ought to stand.

The offense for which the defendant was tried is simple and easy to understand; it was that he received, for and on behalf of the bank, money, checks, drafts, etc., when he knew the bank was insolvent, or he permitted employees to receive such deposits. A bank is insolvent when it cannot pay those who have put their money in it, and it becomes due in the regular course of business. It is also insolvent when the actual cash market assets are not enough to pay what it owes its depositors and other creditors.

The case is important. It involves the conduct of banking institutions of the State. No one need enter into this line of endeavor, but when he does and is an official he becomes a trustee and guardian of the money of the stockholders and the general public, who deposit and lend their money to the bank. Into these banks are deposited and loaned the hard-earned money of merchant, farmer, manufacturer, laborer, professional men, the widow, orphans and all sorts and conditions of people. The poor who are saving for a "rainy day." Banks encourage thrift and saving, and are necessary for business development. They are important to a community. Their success depends on the confidence of the public who trust them with their money. It is important that banks have the money so it can be used in industry and not kept idle. This money often represents the toil and sacrifice of years. For this to be swept away by a bank crashing is a serious calamity and a great wrong. Is the defendant, the president of the bank, responsible under the law for this disaster? The only question involved in this case is: Did the defendant, J. H. Hightower, on 13 January, 1922, when deposits were made on that day, know the bank was insolvent? It was incumbent on the State to prove this beyond a reasonable doubt. The defendant introduced no evidence, but relied on the weakness of the State's evidence. What is some of the evidence showing knowledge? The defendant Hightower was in the employ of the Corporation Commission as a bank examiner eight or ten months prior to 1 July, 1921, when he resigned. That as Bank Examiner he examined the Central Bank & Trust Co. (at that time it was named the City Bank). On 26 April, 1921, he made a report of this bank. The report shows a list of criticisms against the bank, and among the criticisms was an item of $70,000 carried as an investment in the bank building. At the time R. G. Allen was president and H. H. Massey was cashier of the bank. Hightower quit his position as Bank Examiner and went into the very bank he had criticized, within a few months after his criticism of the condition of the bank, and in a little over six months the crash came.

Clarence Latham, State Bank Examiner, when the bank was closed, testified: "The total liabilities of the bank were $352,973.20 and the assets which he considered good amounted to $189,145.23, which left *bad assets as he called them of* $163,828.97; that of the $352,973.20 of total liabilities, $50,243.16 was for capital stock and surplus, leaving total liabilities exclusive of stock of $302,730.04, that left bad assets of $113,584.81; that in the list of assets that he considered doubtful there were the following notes of *R. G. Allen of* $10,000, $7,500, $5,000, $5,000 *and* $4,638.27; that there was a liability of the *Amusement Company of* $10,000 *and* $5,000; *of C. M. Hightower,* $7,500; *Hightower and Massey,* $23,000, $10,000 *and* $20,000; *J. H. Hightower,* $10,000; *Hightower and Massey,* $9,000, and R. W. Warren, $5,000, making a total of $136,638.27, and that these were the assets which he considered doubtful; that all of these, exclusive of R. W. Warren's item of $5,000, he traced back to the original entries items, making $131,638.27, and found that they were obligations of R. G. Allen or the Superba Theater; and that the notes of Hightower and Massey and the Amusement Company and C. M. Hightower, to the extent of $131,638.27, were substituted for the indebtedness of these items; that there was an *R. G. Allen note for* $32,128.27 and an overdraft of *R. G. Allen of* $3,626.40." It will be noted from the testimony that the trust money of the depositors and others was used by the bank officials or former bank officials.

The bank, under Hightower's own statement as a bank examiner to the Corporation Commission, showed it was to be criticized and not in good condition. He knew this, and yet he resigned as a bank examiner and went into this tottering institution and became its president, and in about six months it was a wreck. On the question of scienter or knowledge, this evidence was before the jury, and rightly so. This evidence was relevant as to the question of scienter or knowledge. "The word relevant means that any two facts to which it is implied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves, or renders probable, the past, present, and future existence or nonexistence of the other." Step. Dig. Law Ev., 20; *S. v. Twitty,* 9 N. C., 248; *S. v. Walton,* 114 N. C., 783; *S. v. Hight,* 150 N. C., 817; *Ins. Co. v. Knight,* 160 N. C., 592; *S. v. Stancil,* 178 N. C., 683. Exceptions were made to the exclusion by the court of evidence of a settlement with R. G. Allen, former president of the bank, after its failure, by which settlement the value of some of the assets were enhanced. This was an attempt to get into the record evidence not relevant to the issues of the case, being *res inter alios acta,* and so the judge was right in ruling this evidence out. Its only purpose was to divert the minds of the jurors from the main issue. Suppose Allen did try to

save himself and others, and this can be inferred from the record, and received help to make securities, insolvent or doubtful, better; this was after the crime of 13 January. It was in the nature of restoring goods after they were taken, and was only competent in mitigation of punishment—that restitution was being made for the wrong done. Although the fact that some of the doubtful and insolvent securities were enhanced in value since 13 January, 1922, by Allen was excluded, yet the record shows that this matter was gone into later in the trial and the defendant got the benefit of this evidence, and if there had been error in excluding this class of testimony in the beginning, it was cured by the jury getting the benefit of it during the progress of the trial at a subsequent time. From the entire record the fact that Allen undertook to make good that which was insolvent and doubtful on 13 January was gotten before the jury, notwithstanding the exclusion of this evidence at certain times in the trial.

Mr. W. S. Coursey testified: "That if it should be a fact that Allen did at that time own $40,000 of the capital stock of the Farmers Bank at Louisburg and an equity of real estate in Wake County amounting to $50,000, then his opinion as to the insolvency of Allen was erroneous."

The testimony of Clarence Latham, State Bank Examiner, also shows "That in deducting the amount of bad assets the bank lacked $163,828.97 of being solvent on the morning of the 14th, which was the condition at the close of business on the 13th. That he did not consider that at the commencement of business 13 January, 1922, that the bank's assets were of sufficient cash value to pay its liabilities and depositors; that the liabilities of $352,973.20 included the liabilities of capital stock and a surplus account of $243.16; that the records show that the amount of deposits received on the last two days, the 12th and 13th (of January), were $28,145.50; that when he took charge of the bank there was $678.83 cash on hand and cash items amounting to $612.37, making cash on hand of $1,291.20, and that the bank had paid out on these last two days $27,634.27. That he was requested to take charge of the bank by Hightower and Massey, who said that they had been trying to secure a loan from the Clearing House Association for the purpose of getting enough money to meet their checks, but could not do so, and therefore turned it over to him." This was strong evidence, almost a practical admission that he received deposits on the 13th knowing the bank was insolvent.

In justice to the defendant, who is to be awarded a new trial, on cross-examination Latham testified: "That at the time he formed his opinion as to the solvency of the bank and Allen's debt of $35,000 to the bank, he did not then know that he owned two buildings on Fayette-

ville Street and the Allen Building on the corner of Martin and Blount streets, and $45,000 of stock in the bank at Louisburg, and that he had an equity in the buildings, but did not know what it was worth; that he did not investigate Allen's financial condition by the courthouse records, and that his opinion as to Allen's insolvency was based on investigation that is generally made as to the worth of the party through commercial ratings and otherwise; and that he himself did not investigate anything about Allen's financial standing and ownership of the property, except only the general knowledge that he had of Allen's financial standing; that at the time he formed his opinion of Allen's insolvency he had no definite information as to what property Allen owned or how much bank stock he had, and that his opinion was based on making inquiries which were the opinions of others and commercial reports, and that at the time he formed his opinion as to Allen's insolvency he himself had no exact or definite information as to what property Allen owned at the time or its value."

It will be noted that the entire Court is of the opinion that the expert testimony of the State's witnesses is competent. From my understanding of the essential facts of the record, what was excluded in my opinion was not prejudicial or reversible error.

The State's evidence showed that on Friday, 13 January, 1922, the Raleigh Clearing House Association had a meeting called at the instance of the defendant Hightower, president of the Central Bank & Trust Co., and Massey, its cashier, to consider a loan to that bank. The first meeting was held in the morning about 11 o'clock. At this meeting Mr. Hightower stated that he wanted to get a loan and showed the association a statement of his bank. A committee was then appointed to go over the assets of the bank and to report to the association at 3 p. m. The committee checked over the assets and collateral of the bank, and refused to recommend the loan. The final decision by the association not to make the loan was made about 11 o'clock the night of the 13th. After this failure to secure the loan, Hightower called Latham, either the night of the 13th or early morning of the 14th, and turned the bank over to him, and asked him to take charge of it. It was in pursuance of this request that Latham took the bank over on the morning of the 14th, and made the examination of its affairs and the audit of its books, which showed the bank badly insolvent.

Mr. W. S. Coursey, who audited the books and accounts of the bank, testified:

"Q. For how long a period, Mr. Coursey, had the bank been insolvent from the disclosure of the books? A. From a very short time after its organization. That he considered the bank insolvent on 11 January, 1922."

Hightower allowed the agents of the bank to receive deposits, etc., on 13 January, when he was negotiating with the Raleigh Clearing House Association. Did he not know the bank was insolvent when the negotiations were going on? Yet he allowed innocent depositors to put their money in the bank.

It was a question of fact for the jury. They have rendered their verdict of guilty. They recommended mercy. Perhaps the jurors thought others were also responsible who were not on trial, so they took a merciful view of a serious matter. One of the purposes of punishment is to deter others from committing the same or similar offense. In considering the question of mercy, let us not forget the loss to the innocent and trusting public who had their money deposited, their hard earnings swept away.

In *Wilson v. Suncrest Lumber Co.,* 186 N. C., 57, this Court said: "Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also 'that it is material and prejudicial, amounting to a denial of some substantial right.' "

CLARK, C. J., concurs in the very clearly expressed and able dissenting opinion of CLARKSON, J., that the verdict and judgment in this case should be affirmed. The entire banking system of this country and, indeed, largely the welfare of the entire public, depends upon the honesty and the integrity with which deposits in our banks are kept. Especially is it important to all small depositors, as many were in this case, that they shall feel secure that the small earnings which from time to time they have placed in trust with the bank should be forthcoming when needed.

The masterly review of the evidence in this case would seem to leave no doubt that there has been a gross breach of the high trust reposed in the officials of the bank in the care of its funds, and especially that they should not receive deposits when these experienced officials, who had previously examined the bank, knew its rotten condition.

The juries to whom this matter was committed have twice found this defendant guilty, and it would really seem impossible that, upon the evidence marshaled in the opinion of *Mr. Justice Clarkson,* either jury could have done other than find the defendant guilty beyond a reasonable doubt. It is always possible for counsel for guilty bank officials, by reference to more or less similar cases, ignoring the distinction in minor details among the thousands of cases which can be found in the many thousands of volumes of reports, to find some plausible defect in every proceeding whatever, civil or criminal. This

requires only a little dexterity in argument, but in this case the jury passed upon the evidence and found that there was no reasonable doubt. There is no doubt upon this evidence that the deposits were made, and that by the fault of the bank the depositors have lost their money. No dexterity in argument will serve the losers or do aught to discourage other evil-doers.

The witnesses were expert bank examiners and had recently gone over the vouchers of the bank and knew its condition. In such cases they are competent to express their opinion as to what was the condition of the bank. It would be almost impossible to go over the vouchers, one by one, before a jury and demonstrate to them more clearly and convincingly the conclusion at which they had arrived. They were experts and officials and their conclusion was competent to be submitted to a jury.

One of the most distinguished lawyers of the Union, Elihu Root, expressed the views of the American Bar Association, and indeed of the better element not only of the Bar, but of the entire people, when he said recently: "Every lawyer knows that the continued reversal of judgments, the sending of parties to a litigation to and fro between the trial courts and the appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession. It is a disgrace to our law and a discredit to our institutions."

Nothing would do more to restore the confidence of the public in the banks or be a greater benefit in sustaining the faith due to the many thousands of unquestionably sound banks and honest bank officials than the demonstrated certainty that upon evidence as clear as this and as unquestioned, and especially after two convictions by two several juries, that the verdict of guilty would be sustained regardless of any minute and attenuated errors which can be alleged in any proceeding. It should be made clear to bank defaulters and officials, however influential, that there is certainty of real punishment for violation of their high trust, and that shadowy technicalities and alleged minute errors will not save them. They should be made to understand that, even as Frederick of Prussia said, "Criminals must be made to know that there is law in our State, and that it will be enforced impartially and with certainty against them."

NORFOLK SOUTHERN RAILROAD COMPANY v. CHARLES REID, SHERIFF AND TAX COLLECTOR OF PASQUOTANK COUNTY.

(Filed 27 February, 1924.)

1. Taxation—Counties—Necessary Expenses—Constitutional Law.

The building of bridges on the public roads, and county homes, and their maintenance, are necessary expenses of the county, under the provisions of Article VII, section 7, State Constitution.

2. Same—Statutes—Special Approval.

Article V, section 6, of the State Constitution, as amended, authorizes the Legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute.

3. Same—Supplementing General Funds of the County.

An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitation by Article V, section 6, of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts.

4. Same—Government Agencies.

Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied (Const., Art. V, sec. 7), nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax.

5. Same—Records of Board—Collateral Attack—Correction of Records—Parties—Appeal and Error—Remand.

The clerk of the Superior Court is *ex officio* clerk of the board of county commissioners, and required to correctly record all of its proceedings; and while the record of the board so made as to the levy of a tax may not be impeached in a suit brought by a taxpayer against the sheriff to enjoin the collection of the tax, upon the ground of its unconstitutionality, it may be corrected *nunc pro tunc* by the board of commissioners itself to speak the truth, and this case is remanded, to the end that the commissioners may be made a party to that end.

APPEAL from *Devin, J.*, at January Term, 1924, of PASQUOTANK.

Among other taxes levied by the board of commissioners for 1923 were the following: General county fund, 18 cents on the $100; county road bonds, 26 cents on the $100; general road fund, 6 cents on the $100; general floating debt, 3 cents on the $100; general county schools, 50 cents on the $100.

In December, 1923, the plaintiff brought suit against the defendant to enjoin the collection of $197.65, which was a tax of 3 cents on every

$100 valuation of its property, on the ground that the levy was in excess of the constitutional limitation. A temporary restraining order was issued, and the cause was heard and determined at the January Term, 1924, upon the complaint and answer (which were treated as affidavits), the resolution of the board of commissioners, the levy, and other record evidence.

The defendant in his answer alleged the facts to be substantially as follows: On 11 August, 1923, the board of commissioners met and first determined to levy 15 cents on each $100 valuation of property for general county purposes, and upon further consideration determined that it was necessary to levy a special tax of 3 cents on each $100 valuation for the construction and maintenance of bridges and the maintenance of the county home for the aged and infirm. The board then levied 15 cents for the general county fund and 3 cents as a special tax for the combined purposes of constructing and maintaining bridges and maintaining the home for the aged and infirm. At said meeting the clerk of the board placed the general county fund at 18 cents, adding the 15 cents, general county fund, and the levy of 3 cents for bridges and the county home, making 18 cents on the $100 valuation, and so expressed it in the resolution and on the minutes. For the purpose of computing the taxes, he carried it out on the tax books so as to make one calculation instead of two. The resolution as recorded on the minutes of the board of commissioners for said meeting of 11 August, 1923, is as appears in Exhibit A attached to the complaint. At the meeting of said board of commissioners held in the courthouse on 3 September, 1923, the same being the next regular meeting of the board, the minutes of the meeting held on the first Monday in August, 1923, were read and declared adopted.

His Honor apparently accepted the defendant's answer as true, and found the facts to be as therein set out.

The plaintiff contends that the board of commissioners levied 18 cents for the general county fund, and exceeded by 3 cents the limit prescribed by the Constitution, Art. V, sec. 6, and that the act under which it was levied (Public Laws 1923, ch. 7) is itself invalid. The defendant takes the position that, although the minutes of the board show a levy of 18 cents for the general county fund, only 15 cents was levied for this purpose, and the additional 3 cents for maintaining the county home and building and repairing bridges. The plaintiff replies that the minutes of the board cannot be impeached in this action.

The restraining order was dissolved and the action dismissed. The plaintiff appealed.

Thompson & Wilson for plaintiff.
Aydlett & Simpson for defendant.

ADAMS, J. The plaintiff bases its claim to injunctive relief on the ground that the tax levied for general county purposes is in excess of the constitutional limitation, and therefore illegal. C. S., 858, 7979. There is no suggestion that the tax was levied in breach of Article VII, section 7, of the Constitution, or that the maintenance of the county home and the building and repairing of bridges do not involve a necessary expense. *Long v. Comrs.,* 76 N. C., 273; *Herring v. Dixon,* 122 N. C., 420. But the plaintiff says that the act purporting to authorize the levy of an annual tax in addition to the rate allowed by the organic law is itself invalid, because it conflicts with the provisions of Article V, section 6, of the Constitution.

The amended section is as follows: "The total of the State and county tax on property shall not exceed 15 cents on the $100 value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by Article IX, section 3, of the Constitution: *Provided further,* the State tax shall not exceed 5 cents on the $100 value of property."

The tax was levied under this act: "The board of commissioners of the various counties in the State, for the purpose of maintaining roads, bridges, the upkeep of county buildings, county homes for the aged and infirm, and other similar institutions, and to supplement the general county fund, are hereby authorized to levy annually a tax upon all taxable property not to exceed 5 cents on the $100 of valuation, in addition to any tax allowed by any special statute for the above enumerated purposes, and in addition to the rate allowed by the Constitution." Private Laws 1923, ch. 7.

The plaintiff insists (1) that the tax therein proposed is to be levied, not for a special purpose, but for supplementing the general county fund; and (2) that even if the purpose of maintaining bridges and county institutions be construed as special, the purpose to supplement the general county fund is not special, and as one of the purposes is unauthorized the entire act must fail.

The Constitution, Art. V, sec. 6, was amended as hereinbefore set out in pursuance of chapter 93 of the Public Laws enacted at the Extra Session of 1920. Before the amendment, its provisions were these: "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." C. S., Vol. 2, p. 1119; Const., sec. 6.

The "special approval" which, before the amendment, was to have been given by a special statute, may now be expressed by a special or a general act. It should be noted that the cases cited in support of the plaintiff's position were decided prior to the time the amendment went into effect. The first is *Williams v. Comrs.,* 119 N. C., 520. There it was shown that the General Assembly had authorized the commissioners of Craven County to levy a special tax for the special purpose of maintaining free public ferries, constructing, repairing and maintaining bridges, and meeting the other current expenses of the county (Public Laws 1895, ch. 201), and that the commissioners had levied a tax for all these purposes. It was further shown that the plaintiff had brought suit to enjoin the collection of the tax, and that a temporary restraining order theretofore granted had been vacated at the hearing. On appeal the judgment was reversed and the injunction was made permanent, two of the Justices dissenting. The Court decided that building bridges and maintaining public ferries are special purposes in the constitutional sense, but declared the tax unconstitutional on the ground that it had been levied, not only for these purposes, but to meet the current expenses of the county. The levy was treated as indivisible and the entire tax was held to be uncollectible.

In *R. R. v. Cherokee County,* 177 N. C., 86, the plaintiff sought to recover the amount of certain taxes paid under protest. The act there in controversy purported to authorize the board of commissioners of any county in the State to levy a special tax in excess of the constitutional limitation "to provide for any deficiency in the necessary expenses and revenue of said respective counties." Public Laws 1913, ch. 33, sec. 9. This Court held that the first and sixth sections of Article V of the Constitution (before they were amended) should be considered together; that the act of 1913 was not a special law, and that a tax levied for current expenses was not levied for a special purpose. In a concurring opinion *Mr. Justice Walker* dissented from the conclusion that section 6 permitted a tax exceeding the limit fixed in the first section; but by reason of the amendments this question is not now material. In a later reference to the case he said: "In that case the tax was intended to provide for past deficits in the revenues for ordinary and necessary county expenses, and fell directly within Article V, section 1, of the Constitution, prescribing the limitation and equation of taxation, not within section 6 of that article." *Parvin v. Comrs.,* 177 N. C., 508.

Also, in *R. R. v. Comrs.,* 178 N. C., 449, the object was to recover a tax which had been levied under a public-local law "to meet the current and necessary expenses of the county" (Public-Local Laws 1917, ch. 101, sec. 1), and the Court held, as in the *Cherokee case,* that the tax was illegal, and sustained the plaintiff's recovery.

Now, if we apply the statement of *Chief Justice Marshall,* that "every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered" (*U. S. v. Burr,* 25 Fed. Cases, p. 165), we must conclude that, although a tax "to supplement the general county fund" is not a tax for special purpose, neither of the decisions cited by the plaintiff sustains the contention that the maintenance of the county home or the building and repair of bridges is not such special purpose as comes within the purview of the sixth section of Article V. On the contrary, while the construction and maintenance of the county home and the building and repairing of bridges may be considered a part of the ordinary expenses of the county, to be defrayed out of the general county revenue when sufficient for these purposes, still a tax levied under a special or general act for the specific and exclusive purpose of constructing, maintaining or repairing courthouses, jails, county homes, highways or bridges is deemed to be levied for a special purpose. Therefore, if the tax of 3 cents was levied to provide for constructing, repairing or maintaining bridges or the county home, the purpose was special. *Brodnax v. Groom,* 64 N. C., 244; *Jones v. Comrs.,* 107 N. C., 248; *Williams v. Comrs., supra; Herring v. Dixon, supra; R. R. v. Comrs.,* 148 N. C., 220, 240; *Jackson v. Comrs.,* 171 N. C., 379, 382; *Moose v. Comrs.,* 172 N. C., 419, 428; *Parvin v. Comrs., supra; R. R. v. McArtan,* 185 N. C., 201.

The plaintiff further objects that the act of 1923 does not indicate the special purpose to which the authorized tax shall be applied, and in this respect fails to comply with the mandate laid down in Article V, section 7, of the Constitution. This section provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and that it shall be applied to no other purpose. But in passing the act in question the Legislature neither professed nor intended to levy a tax, but merely to delegate its power of taxation within specified limitations to the various counties as agencies of the State for the convenience of the local administration. The exercise of such power has frequently been upheld and is now generally recognized. The reason for it, as stated in *Caldwell v. The Justices,* 57 N. C., 323, applies with equal force under existing conditions. "From time immemorial the counties, parishes, towns and territorial subdivisions of the country have been allowed in England, and, indeed, required to lay rates on themselves for local purposes. It is most convenient that the local establishments and police should be sustained in that manner; and, indeed, to the interest taken in them by the inhabitants of the particular districts, and the information upon the law and public matters generally thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government

through representatives which has been so conspicuous in the mother country and so eminently distinguishes the people of America. From the foundation of our Government, colonial and republican, the sums necessary for local purposes have been raised by the people or authorities at home. Courthouses, prisons, bridges, poorhouses, and the like, are thus built and kept up, and the expenses of maintaining the poor and of prosecutions and jurors are thus defrayed, and of late a portion of the common-school fund and a provision for the indigent insane are thus raised, while the highways are altogether constructed and repaired by the local labor distributed under the orders of the county magistrates. When, therefore, the Constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers before and after their migration to this continent."

From the decisions cited it seems to be clear that a tax cannot be levied under the act of 1923 "to supplement the general county fund," and that the clause purporting to authorize such tax runs counter to Article V, section 6, of the Constitution; but we do not concur in the argument that the act is for this reason void in its entirety. A statute may be constitutional in part, and in part unconstitutional. "The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter may be disregarded." *Board etc. v. Stanley,* 105 U. S., 405; 26 Law Ed., 1044, 1050. An examination will show that our own decisions are in accord with this principle. *Johnson v. Winslow,* 63 N. C., 552; *S. v. Joyner,* 81 N. C., 534; *S. v. Barringer,* 110 N. C., 525, 529; *McCless v. Meekins,* 117 N. C., 34, 39; *Greene v. Owen,* 125 N. C., 212, 222; *Smith v. Wilkins,* 164 N. C., 136, 146; *Moran v. Comrs.,* 168 N. C., 289. It follows, then, that the invalidity of the clause purporting to authorize the levy of a tax to supplement the general county fund, in addition to the rate allowed by the Constitution, does not essentially nullify the other provisions of the act of 1923. We see no sufficient reason for holding that a tax separately levied for any of the special purposes therein specified (excluding the tax to supplement the general county fund) may not be collected if the requirements as to the manner of making the levy are complied with. So the controversy between the parties in the case before us turns upon the question whether the tax of 3 cents was levied for special purposes, as contended by the defendant, or for the benefit of the general county fund, as contended by the plaintiff. If it was imposed to supplement the general county fund, as the minutes of the board seem to indicate, it cannot be collected.

This conclusion leads to consideration of the objection which presents the question whether the record of the commissioners can be attacked and error shown in a collateral proceeding between the taxpayer and the tax collector. As stated heretofore, the minutes show that 18 cents on property valued at $100 was levied for general county purposes. Can the record showing this levy be contradicted or altered or corrected at the instance of the officer who collects the taxes, when the commissioners are given no opportunity to be heard? Would not such procedure demoralize the system under which taxes are levied, and result in

> . . . "ruin upon ruin, rout on rout,
> Confusion worse confounded"?

The register of deeds is constituted clerk *ex officio* of the board of commissioners, and is required to record all the proceedings of the board in a book to be provided for this purpose. C. S., 1309, 1310. The object is to preserve a memorial of official transactions, which shall serve both as a record and as a guide. By this memorial the commissioners speak. It is the evidence of what they have said and done—the record of their proceedings. "Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. If they choose to keep minutes, which they understand and can act on to their own satisfaction, it is well. If from them they can afterwards undertake to draw out the record to perpetuate it to their successors or to communicate its contents to another court, I know nothing to prevent them, but the difficulty in their own minds of being sure they make it what it was intended originally to be. But until the record be so framed, another court cannot know more than the words of the minutes in themselves import. The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established." *Wade v. Odeneal,* 14 N. C., 423. This conclusion, we think, is sustained by several decisions. *Cline v. Lemon,* 4 N. C., 323; *Spencer v. Cohoon,* 18 N. C., 27; *Galloway v. McKeithen,* 27 N. C., 12; *Edwards v. Tipton,* 77 N. C., 222, 226; *Wilson v. Markley,* 133 N. C., 616; *Re Joseph Young,* 22 L. R. A. (U. S.) (Cal.), 330.

Can the record of the levy yet be amended if it was incorrectly made and is not subject to collateral attack?

If the tax of 3 cents was properly levied and apportioned, as contended by the defendant, and was combined with the county tax by the clerk of the board only as a matter of convenience to him in making his computation and as a means of obviating the necessity of running out two calculations, it may be possible for the commissioners to amend their record *nunc pro tunc,* so that it may "speak the truth." In *Wal-*

ton v. Pearson, 85 N. C., 35, 48, it is said: "It is the duty of every court to supply the omissions of its officers in recording its proceedings, and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records as made. This power of a court to amend its records has been too often recognized by this Court, and its exercise commended, to require the citation of authorities, other than a few of the leading cases on the subject. See *Phillipse v. Higdon,* 44 N. C., 380; *Foster v. Woodfin,* 65 N. C., 29; *Mayo v. Whitson,* 47 N. C., 231; *Kirkland v. Mangum,* 50 N. C., 313."

But such amendment can be made only by the commissioners, and only in case they find that the entry on their minutes is incorrect—that it does not speak the truth. If the tax was levied, as it now appears on their record, they have no power to amend it. But in view of the importance of the controversy, we think they should have an opportunity to be heard. We have, therefore, concluded that the rights of the parties may be protected and the controversy more satisfactorily determined by remanding the cause to the Superior Court of Pasquotank County, with leave to the plaintiff or the defendant to move that the board of commissioners be made a party to the action. All the questions involved in the appeal may then be disposed of in accordance with this decision. If the board be not made a party, or if it be determined that the tax of 18 cents was in fact levied for general county purposes, as it now appears upon the minutes of the board, the order restraining the collection of the tax in excess of 15 cents should be made permanent. For these reasons the judgment is reversed and the cause remanded.

The plaintiff will recover the cost of this appeal.

Reversed and remanded.

STATE v. MILLARD HENDRICKS.

(Filed 5 March, 1924.)

Evidence—Expert Opinion—Handwriting—Criminal Law—Larceny.

Where relevant to the inquiry in a criminal action for the stealing of an automobile to show that the accused was present in a certain city at the time thereof, which the defendant denied and has offered evidence to the contrary, it is competent for a witness to offer in evidence a leaf cut by himself from a hotel register indicating the name of the hotel and dates of registration of guests, with the surname of the accused entered thereon under the date of the commission of the crime, and to testify that it was

a leaf from the hotel register then kept for the registration of guests, with an entry of one under the surname of the accused, but with different initials, and, under C. S., 1784, for experts in handwriting, by comparison, to testify their opinion that the person who made the entry on the hotel register was the same as the one who signed certain papers introduced upon the trial and admitted to be in the handwriting of the accused.

ADAMS, J., dissenting; STACY, J., concurring in the dissenting opinion.

APPEAL by defendant from *Bond, J.*, at June Term, 1923, of DURHAM.

The defendant was convicted of the larceny of an automobile, and from the judgment on the verdict appealed.

The automobile was stolen from the garage of Dr. Bowling, the owner, on the night of 10 September, 1920, between 10 o'clock at night and daylight. He offered a reward of $100 for its recovery, but did not locate it until 6 October, 1921, at Winston, N. C. The car was completely identified, although on inspection it was found that the number and marks on the engine and carburetor had been knocked off with a chisel and mutilated. It was found in the possession of one Gordon, who purchased it from Roy Ingram, who himself purchased it from the defendant in the latter part of February, 1921.

The defendant testified that he got the car from one Bill York, at Cheraw, S. C., on election day of the year 1920, but produced no other evidence than his own statement of this. Thus the car was traced to the possession of the defendant a little less than two months after it was stolen. The State, in order to connect the defendant with the theft, introduced evidence to show that he was in Durham at the time the car was missed. C. E. Stewart, witness for the State, showed a paper which purported to be a printed leaf out of the register of the Church Street Hotel, in Durham, and testified: "I got that paper from the register at the Church Street Hotel. I personally took it out of the Church Street Hotel register. Mr. Clayton was with me when I took it out. I got it a week or two after Dr. Bowling's car was found." The entry upon this sheet in the register was dated 10 September, 1920, and the name appearing thereon was signed "F. D. Hendricks." Expert witnesses, under the statute (C. S., 1784), were introduced to compare this entry on the Church Street Hotel register on 10 September, 1920, with the admitted signatures of the defendant to the bonds executed in this cause, and also an affidavit filed by the defendant in the cause.

The defendant excepted to the refusal of a judgment of nonsuit.

Both the defendant and his wife pleaded an *alibi* on 10 September, 1920. The defendant testified: "On the night of 10 September, 1920, I was out about five miles from High Point, at my aunt's, Annie Allred. I was not in Durham that night. I never stayed all night in Durham in my life." The wife testified that they were out at his aunt's house

the night of 9 September, and further testified that her husband was in High Point between 9 September and election day.

Upon the verdict of guilty the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Hammer & Moser for defendant.

CLARK, C. J. C. S., 1784, provides: "In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." In this case it was a link in the evidence for the State to prove the presence of defendant Hendricks at Durham on 10 September, 1920, when the automobile was stolen, and, to prove this fact, a paper-writing purporting to be a leaf, with the printed heading, from the register of the Church Street Hotel, bearing date 10 September, 1920, was introduced for the purpose of proving that the name therein registered was in the handwriting of the defendant. Proof of his handwriting was, therefore, relevant and as a basis for comparison of the signature in controversy with his admitted handwriting on the papers in this action with the signature on the leaf was competent when properly identified and authenticated.

The defendant makes two objections to the admission of this evidence—first, that the paper itself was not sufficiently identified as the register of this particular hotel; and second, even if it had been so identified, it was not admissible in evidence against this defendant.

The evidence of the witness Stewart is clear and distinct that this sheet was taken by himself from the register of the Church Street Hotel. It was not necessary to introduce the clerk of the hotel to prove that the defendant made this signature upon such register. The evidence of the witness Stewart that it was a part of that register, bearing date of 10 September, 1920, if believed, which was a matter for the jury, was sufficient to identify the paper as a part of the register of the hotel; and second, the experts testified that the signature upon that sheet of the register was in the same handwriting, in their opinion, as that on the bonds and affidavit; and the defendant himself claimed that he had a brother, named F. D. Hendricks, but that this signature was not in his handwriting.

It has been held that such registers are admissible both as to the party writing the name on the register and the date on which it was

written. In *Latham v. State,* 172 S. W. (Texas), 801, it is said: "He had the hotel register with him, which was identified by him as such at the time. The best evidence of the fact was the hotel register with her signature thereon." There was a rehearing in that case, in which the original decision of the court was reversed on another point, but the Court said: "Now, what would be the best or primary evidence that she had registered under the name of Mrs. C. C. Evert? There can be no question that the register of the hotel would be the best evidence of that fact."

In *James v. Conklin,* 158 Ill. App., 643, it is said: "We do not think the court erred in admitting in evidence the hotel register and expense account of Kurtz. They were competent as bearing upon the contention of appellee that Kurtz was not in Olney on 28 August, 1905, and for that reason he could have been at appellant's place of business on that day, the date of his receipt to the bills in question."

The evidence in this case by Stewart is that he cut this particular leaf with this signature out of the register of the Church Street Hotel, bearing date 10 September, 1920, and that he cut it out in the presence of Clayton, and that there has been no alteration or change in the leaf since he had thus cut it out. Of the truth of his statement the jury was the sole judge.

The expert witnesses having further testified as authorized by C. S., 1784, that in their opinion the handwriting on this leaf of the register was the same as that of the signature of the defendant to the bond and other papers in this cause, there was no error in leaving the case to the jury.

It is not essential that the hotel register itself must be brought into court and by its proper custodian. It is sufficient if it is proven to the complete satisfaction of the jury that this particular sheet, with this signature, was taken from the hotel register bearing the date in question, and that the experts could satisfy the jury that the signature on that sheet was made by the same hand which wrote the name of the defendant on the papers in this cause. A letter or any other paper with similar identification of the time and place where written would be competent.

The contents of the hotel register is not to be proven, nor is it introduced to prove any other fact than that the signature on that leaf was made by the defendant with the identification of the time and place. It is no act of the hotel, but merely the presence of the defendant in Durham which is sought to be proved.

The defendant further assigns as error that the court charged the jury that the expert witness, Jones, testified that he examined the sheet which Stewart had testified he had taken from the Church Street Hotel

register in Durham, bearing date 10 September, 1920, and that, comparing that sheet with the other three papers that were admitted to be in the handwriting of the prisoner, the expert testified that in his opinion all four—that is, the word "Hendricks" in all four of the names—was the same handwriting, and that the same hand did the writing; and also assigns as error that the court charged the jury: "The State contends that this defendant was here in Durham the night that the car was taken; that the hotel register leaf kept entries made as people would come in, day by day, showing the time of arrival and departure of different people, the number of room, etc.; that it shows that on Friday, 10 September, 1920, a man registered there as F. D. Hendricks; that he was assigned to room 8; that he arrived at 7:45, whether in the morning or evening does not appear, and that he left, after paying a bill which had run up to $3. The State contends that you ought to find from the evidence in this case that the hand that wrote the word 'Hendricks' was that of the prisoner, and contends that there is a paper here that it is admitted—three papers—all three of which have the word 'Hendricks,' not the same initials, but the same surname, and the State contends you ought to find as a fact the word 'Hendricks' in all four of them was written by the prisoner, and that they ought to convince you that he was here in Durham on the day or during the night on which Dr. Bowling's car was stolen."

The defendant further assigns as error the additional contention of the State that, in the face of these facts—that a man with a stolen car, as the State contends, in his possession, with the number which would serve to identify the car chiseled out, but with the car identified, in his possession, and with the hotel register showing his presence in Durham the identical night the car was stolen—the State contends you ought to find beyond a reasonable doubt that the prisoner is the man who stole and carried away the Hudson Super-Six that belongs to Dr. Bowling."

These were correct statements of the contentions of the State. If the jury believed, of which they were the sole judges, that the hotel sheet shown in evidence was cut by Stewart from the Church Street Hotel register, in Durham, bearing entries for the date of 10 September, 1920, and that the same had not been altered, it was not necessary that the whole hotel register should have been put in evidence, nor that it should be produced by its custodian. The essential fact is, was it the leaf of the hotel register of that date, and if so, it was competent to be put in evidence and for experts, under the statute (C. S., 1784) to testify as to it being, in their opinion, in the same handwriting of the defendant made in the proceedings in this cause.

Upon consideration of all the exceptions, we find

No error.

ADAMS, J., dissenting.

The defendant, who lived in High Point, was convicted of the larceny of an automobile, the property of Dr. E. H. Bowling, whose home was in Durham. The car was stolen from Dr. Bowling's garage on the night of 10 September, 1920, and was recovered by him on 6 October, 1921, at Winston-Salem. It was definitely identified although the numbers on the engine and carbureter had been removed. It was found in the possession of a man named Gordon. He had purchased it from Roy Ingram, and Ingram from the defendant. The defendant claimed to have gotten it from Bill York, at Cheraw, S. C. To show that the defendant was in Durham when the car was stolen the State introduced as a witness C. E. Stewart, who was asked the following questions:

"Q. I hand you a paper and ask you what that purports to be? A. It purports to be a leaf out of the register at the Church Street Hotel. Church Street Hotel is at the corner of Parrish Street and Church Street in Durham.

"Q. What date does that paper bear? A. I got that paper from the register at the Church Street Hotel. I personally took it out of the Church Street Hotel register. Mr. Clayton was with me when I took it out. I got it a week or two after Dr. Bowling got his car back.

"Q. Was that some time in the fall of 1921? A. Yes, sir. I said I got that from the hotel. Mr. Clayton was present when I got it. I have had possession of it most of the time and Mr. W. G. Bramham had it the rest of the time. It is exactly like it was when I took it from the hotel register. There have been no changes or mutilations on it and no writings have been added to it."

The defendant in apt time objected to each of these questions and to the admission of the paper in evidence.

The witness then said: "I find on that paper, dated 10 September, 1920, the name of a man Hendricks. His initials appear to be F. D. I have never seen defendant write his name. I never saw him give either one of the bonds."

Nick Lewis, a witness for the State, testified: "I do not work at Church Street Hotel. I have never worked there. The Durham Hotel and Church Street Hotel in 1920 were operated by the same person. I own the Durham Hotel. I bought it from the man who used to run the Church Street Hotel. I do not know the register that was used in the Church Street Hotel in 1920. I see the leaf that came from the Church Street Hotel; it looks like the Durham Hotel to me. I cannot understand how that came from the Durham Hotel. They showed it to me the other day. I do not know whether they used the same register at both hotels in 1920. Steve Changaris might have taken some leaves

with him to the Church Street Hotel. He was in charge of it in 1920. I do not remember who was the clerk. I never saw those leaves up there. I had nothing to do with the Church Street Hotel. I never have been there in my life. That might have come from the Church Street Hotel but that has Durham Hotel on there. In 1919 I bought the Durham Hotel from Steve Changaris. I do not know what register he used in the Church Street Hotel. I have never been up there. They were both operated by the same man prior to the time I bought it. I purchased the Durham Hotel, I think, in January, 1919, or 1920. I never did own the Church Street Hotel. I never have been up there. I heard that the same people owned them both prior to January, 1919. This leaf says the Durham Hotel. I do not know whether it came from the Durham Hotel or Church Street Hotel. This does not say anything about Church Street Hotel; it was the Durham Hotel. I do not think it came out of the Church Street Hotel. I do not know whether it did or not. I never gave it to Stewart out of my register. I do not know where it came from."

Papers were introduced bearing the defendant's name in his handwriting, and experts compared this with the entry on the hotel register and expressed the opinion that the handwriting in each was the same. This was excepted to by the defendant.

In this case the disputed writing was the name of F. D. Hendricks as it appeared on a paper purporting, as testified by one witness, to be a leaf from the register of the Church Street Hotel, and as testified by another, from the register of the Durham Hotel. The contested question was whether this name was in the handwriting of the defendant. It was the purpose of the prosecution to show that the defendant registered under the name of F. D. Hendricks a short while before the car was stolen, that he disappeared about the time it was lost, and that sixty days afterwards he had the car in his possession. Proof of his handwriting was therefore relevant, and as a basis for comparison of the signature in controversy with his admitted handwriting, the register was competent *when properly identified and authenticated. Latham v. State,* 172 S. W., 797, 801, 808; *James v. Conklin,* 158 Ill. App., 640, 643; *People v. McKeown,* 171 Ill. App., 146.

The defendant contended that the signature had been admitted in evidence without due proof that the leaf on which it was written was a part of the register of the Church Street Hotel. Proof that the leaf had been taken from the register of this hotel was particularly important in view of a conflict in the testimony of Stewart and of Lewis. Stewart said he had taken it "out of the Church Street Hotel register." Lewis testified, "This leaf says the Durham Hotel." Identification of the paper was therefore absolutely essential to a fair trial.

In the opinion of the Court it is said that the loose leaf was properly identified by Stewart. This conclusion, I think, is not justified. It was this pretended identification to which the defendant objected *in limine*. He objected because Stewart's testimony was manifestly based either upon the "purport" of the register or upon information derived from another. In either event the basis of his pretended identification was not sufficient. What are the facts? The car was stolen on 10 September, 1920. More than a year afterwards two men who, so far as the record shows, had never before entered the Church Street Hotel went there and, without the knowledge or consent of any one connected with the hotel, abstracted a leaf on which was written the name of F. D. Hendricks. Why did these men conclude that the book from which the leaf was taken was the hotel register? If from what some one told them, Stewart's testimony was incompetent as hearsay. This is elementary. But there is no evidence that any one told them anything. If they reached their conclusion from what the book purported to be, Stewart's testimony was equally incompetent.

The rule is that a record of this character must come from the proper custody, and that its identity and genuineness must be established; for the court must be satisfied by legal and competent evidence that the paper is what it purports to be. The reasons for the rule are thus formulated by Wigmore in his work on Evidence:

1. "Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A horse or a coat contains upon itself no indications of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasized by the judicial requirement of evidence to that effect.

2. "The original of a writing is usually presented to the tribunal 'in specie,' while other material objects are not required to be and seldom are brought into court (except such articles as the tools of a crime or the clothes of a victim); so that, in practice, the most common opportunity for the operation of this aberrant tendency occurs for writings, visibly in existence and mutely suggesting that they are all that they purport to be. Thus the mental tendency is especially forcible, frequent, and misleading where documents are involved. For these two reasons, then, it has happened that the specific rules that have grown up concerning modes of authentication have come to relate to writings alone.

"Thus it is that in the traditions of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it." Vol. IV (2 ed.), sec. 2130.

It seems to me that the opinion of the Court has lost sight of this distinction and has confused "the mere existence of the purporting document" with the external evidence of its identification, and in consequence of this "aberrant tendency" has approved the admission of incompetent evidence. The foundation for the admission of the objectionable evidence should first have been laid by proving that the register from which the leaf had been taken contained a record of the names of guests and other entries made at the date mentioned in the regular course of the business conducted by the hotel. *Reeves v. Davis,* 80 N. C., 209; *Mott v. Ramsay,* 92 N. C., 152; *Glenn v. Orr,* 96 N. C., 413; *Springs v. Schenck,* 106 N. C., 154; *Darden v. Steamboat Co.,* 107 N. C., 437, 446; *Cheatham v. Young,* 113 N. C., 161; *Trust Co. v. Benbow,* 135 N. C., 303; *Edwards v. Erwin,* 148 N. C., 429.

For error in the admission of evidence there should be a new trial.

STACY, J., concurs in this opinion.

D. E. COBB, ADMINISTRATOR, v. GEORGE M. FOUNTAIN AND R. S. FOUNTAIN, ADMINISTRATORS.

(Filed 5 March, 1924.)

1. Guardian and Ward—Estates—Settlement.

The general principle that a guardian may discharge himself of his trust as such by turning over to the person lawfully entitled thereto whatever security he may have taken in good faith, as guardian, as a result of the prudent management of his ward's estate, and thus discharge himself of liability, is subject to the exception that there be not special reason existing to the contrary.

2. Same—Trusts.

While the word "trust" in its application to a guardian in the management of his ward's estate has a more restricted significance, upon his qualification as such, he assumes all the responsibilities of his position and obligates himself to exercise such care and diligence in the management of his ward's estate as a man of ordinary care, prudence and intelligence uses in the management of his own business.

3. Same—Presumptions—Prima Facie Case—Evidence—Questions for Jury.

The complaint in an action against a guardian alleged that he had loaned money of his ward's estate to one beyond the State, and the jurisdiction of our courts, on a note that was long past due and unpaid; and upon demurrer, considered as admitting these allegations, it was *held* the circumstances of this transaction made out a *prima facie* case that he had not acted with the care or prudence required of him, and raised the issue for the jury to determine.

APPEAL from *Connor, J.*, at November Term, 1923, of EDGECOMBE.

The material allegations of the complaint are substantially these: (1) Several years ago G. M. T. Fountain, deceased, qualified as guardian of Nancy L. Hargrove (who at that time and afterwards until her death was insane and confined in the State Hospital at Raleigh) and had the sole management of her estate. (2) As such guardian he loaned $2,400 (her money) to a resident of South Carolina and took as security therefor a mortgage or deed of trust on real property, situated in that state. (3) He never reported to the court the nature of this investment and never had the court's approval of the loan. Excepting interest no payments have been made, and it is not improbable that the loan or a part of it will be entirely lost. (4) Nancy Hargrove died in 1921 and the plaintiff is her administrator. (5) G. M. T. Fountain died in 1923 and the defendants are the administrators of his estate. (6) The note for said $2,400 with interest is overdue. (7) The plaintiff as administrator of Nancy L. Hargrove made demand upon G. M. T. Fountain and, after his death, upon the defendants as his administrators for the payment of said loan and interest, and the defendants have neglected and refused and still neglect and refuse to pay to the plaintiff the amount so demanded. (8) The plaintiff is ready to settle in full as administrator of his intestate and to file his final account, and is prevented from doing so by the failure of the defendants to make payment of said loan. (9) The estate of said G. M. T. Fountain is solvent.

The plaintiff prays judgment against the defendants for $2,400, with interest thereon from 14 January, 1923, and costs.

The defendants demurred to the complaint on the following grounds:

1. It does not show that defendant's intestate failed to use such degree of care and prudence as guardian of plaintiff's intestate as to render his estate liable for any loss plaintiff's intestate's estate may sustain.

2. It does not show that plaintiff's intestate has sustained any loss or damage.

3. It does not allege that said loan was not made in good faith and in the exercise of that degree of care and diligence required by law.

4. Said complaint does not show that said transaction complained of has ever been repudiated by plaintiff or those he represents.

5. Such complaint fails to set forth facts and circumstances necessary to charge the defendant's intestate's estate with personal liability.

Judge Connor overruled the demurrer, and the defendants appealed.

Allsbrook & Phillips for plaintiff.
Geo. M. Fountain for defendants.

ADAMS, J. As a general rule a guardian may discharge himself at the termination of his trust by turning over to the person lawfully entitled thereto whatever securities he may have taken in good faith as a result of the prudent management of his ward's estate. Schouler's Domestic Relations, 544, sec. 386. "The ward is bound to accept a bond in discharge of a guardian which the latter properly took and has not made his own by fraud or laches. The Court has said that such bonds, in truth, belong to the ward, and that although they are negotiable, one who takes them from the guardian with notice must account for them to the ward. *Powell v. Jones,* 36 N. C., 337; *Exum v. Bowden,* 39 N. C., 281. It follows that in equity the guardian is entitled to transfer the bonds to the ward in satisfaction and is not bound to pay the ward in money. Indeed, the statute expressly provides that the guardian may assign any uncollected bonds to the ward and that such assignment shall be a discharge *pro tanto.*" *Ruffin, C. J.,* in *Goodson v. Goodson,* 41 N. C., 238, 242; Rev. Sts. of N. C., Vol. I, 310; C. S., 2308, 8107. But this general rule, like most others, is subject to exception. Hence, the Court afterward said: "It cannot be doubted that a guardian may discharge himself by delivery over to the ward upon a settlement of the notes which he has taken as guardian, provided there be no special reason to the contrary." *Whitford v. Foy,* 71 N. C., 527. Since the demurrer admits the truth of the complaint, the question is whether the facts alleged bring the case at bar within the proviso.

While in its more restricted acceptation the word "trust" may have acquired a meaning distinct from the confidence usually reposed in one who sustains to another the relation of guardian, it is nevertheless established as a rule of equity that where a person qualifies as the guardian of an estate and engages to act upon the trust and confidence thus reposed in him the court, in order to protect the estate, will deal with him as a trustee. Upon this principle the intestate of the defendants, upon his qualification as guardian, assumed all the responsibilities and duties of his position and obligated himself to exercise such care and diligence in the management of his ward's estate as men of ordinary care, prudence, and intelligence use in the management of their own business. His trust called for the exercise of good faith, for his personal oversight and supervision of the trust funds, and for the ob-

servance of the statutory provisions relating to his fiduciary obligation. Tiffany's Persons and Domestic Relations, 318; Schouler's Domestic Relations, 451, sec. 321; Black on Trusts and Trustees, Vol. II, sec. 499; *Moore v. Askew,* 85 N. C., 199; *Collins v. Gooch,* 97 N. C., 186. In the management of his ward's funds, did the guardian exercise the degree of care demanded by the exigency of his trust?

As it is more prudent for a guardian to invest trust funds in his own State, where they may be kept under his immediate observation and within the jurisdiction of the domestic courts, we think the investment of his ward's money in securities which are beyond the jurisdiction should be disapproved unless made under rare and exceptional circumstances. The precise question has not heretofore been considered by this Court. In *Collins v. Gooch, supra,* the receiver of an estate belonging to minors deposited some of their money in a bank in Norfolk without taking additional security, and the bank failed. The Court held that the guardian was liable for the loss, and remarked: "We think a guardian would be deemed derelict who should thus invest the estate of his wards by deposit in another State without security. However solvent may be the person or persons to whom, as principal, money is loaned, it is his duty to require further security." The decision turned upon the lack of security rather than the place of investment; but both questions were discussed in a case decided by the Supreme Judicial Court of Maine. There it was said: "It is true that it probably sufficiently appears upon the face of the account that these three items were investments without security, and also that they were made beyond the jurisdiction of the Court. The former infirmity renders the accountant responsible for all losses thence arising, *Mattocks v. Moulton,* 84 Me., 545, and the latter, except under peculiar circumstances nonexistent in the case at bar, also subjects him to the peril of responsibility for the safety of the fund." *In re Moore,* 112 Me., 119; Ann. Cas., 1917 A, 645.

Other courts have reached substantially the same conclusion, as will appear from a few excerpts. "While, therefore, we are not disposed to say that an investment by a trustee in another State can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity, or a very pressing emergency." *Ormiston v. Olcott,* 84 N. Y., 339, 343. "In view of the inherent objections to such investments, of the familiar rules of equity which regard them with distrust, and of the careful exclusion of such mortgages from the

broad range of permissible trust investments mentioned in the General Statutes, 495, we think that loans on promissory notes secured by mortgage of land in other States, and the purchase of such notes, cannot be regarded as *prima facie* a proper investment of trust funds; and that a trustee must justify such use of his funds by proof not only of good faith, but of due diligence on his part in ascertaining the safety of the particular investment." *S. v. Washburn,* 67 Conn., 187, 194. "The tutor had no right to send the minor's property beyond the State except for the collection of money due on obligations. He had no right or authority to invest these funds beyond the limits of the State and out of the jurisdiction of the court having jurisdiction of the tutorship." *Welsh v. Baxter,* 13 So. (La.), 629. See, also, *Selph v. Burton's Admr.,* 68 S. W., 407; *Lyne v. Perrin,* 31 S. W., 869.

While not disposed to hold that a guardian may never invest his ward's funds beyond the jurisdiction of the domestic courts, we are of opinion that such investment is *prima facie* improper and that upon proof thereof it is incumbent upon him, at the risk of an adverse verdict if he fail, to proceed with evidence tending to show that he has faithfully performed the duties imposed by his trust. In the instant case the question of the guardian's fidelity or dereliction—whether he faithfully discharged his fiduciary obligation or disregarded or abused his trust—will be determined upon a full disclosure of all the facts, many of which, if not all, were essentially within his personal knowledge. We think, therefore, that his Honor, by overruling the demurrer and granting time for filing an answer, appropriately opened the way for an inquiry into all matters by which the courts may finally adjudicate the question of the guardian's neglect of duty or exemption from liability.

We deem it not improper to say that the plaintiff's counsel have not assailed the character of the guardian or impeached his integrity or imputed to him any intentional failure to execute his trust. But they say that upon him and, after his death, upon his personal representatives devolved the duty of disclosing the facts pertaining to the investment with a view to securing a proper settlement of the controversy between the parties.

The judgment is

Affirmed.

G. H. PITTMAN v. TOBACCO GROWERS CO-OPERATIVE ASSOCIATION.

(Filed 5 March, 1924.)

1. **Contracts—Fraud—Co-operative Associations—Collateral Attack—Quo Warranto—Corporations.**

   A member of a coöperative tobacco growers association, formed and incorporated under a valid statute, cannot attack the validity of the organization for lack of a sufficient number of signers, it being for the State upon a *quo warranto* to vitiate the incorporation.

2. **Contracts — Co-operative Associations—Fraud—Evidence—Questions for Jury.**

   Evidence that a member of a coöperative tobacco growers association had been afforded ample opportunity to read and understand the membership contract before signing it, and who could have done so, is sufficient to take the case to the jury upon his defense that he had been induced by the fraudulent misrepresentations of the association as to its contents.

3. **Same—Instructions.**

   The fraudulent misrepresentations upon which a party seeks to set aside his written contracts must, among other things, have been reasonably relied on, and an instruction to this effect upon the evidence in this case *is held* to be without error.

4. **Same—Promissory Representations.**

   Promissory representations looking to future profits or advantages cannot be considered upon the issue as to whether a party signing a contract with full opportunity to know its contents, was induced thereto by the fraudulent misrepresentations of the other party to the contract.

5. **Corporations—Co-operative Association—Contracts—Mismanagement.**

   A member of a tobacco growers association cannot avoid his membership contract upon the ground of mismanagement of the corporation after its organization.

APPEAL by plaintiff from *Horton, J.*, at August Term, 1923, of PITT.

The plaintiff was a merchant and was vice-president of a large mercantile corporation doing an annual business of $100,000. He was besides a farmer, cultivating 100 acres of his own land and with a number of tenants. It was in evidence that on the organization of the defendant association he became much interested, obtained a number of contracts and kept them in his store; distributed them to his customers and others, and advocated the desirability of joining the association. At a meeting in April, 1921, at his store, for the organization of the defendant company and obtaining members, he was present and handed out blank contracts asking others to read and sign, and the next day signed the contract himself. He assisted the representative of the Department of Agriculture in obtaining signatures.

In September, 1922, seventeen months after he signed the contract, he alleged that he had been defrauded. He does not allege in his complaint that there were any false promises made to him without intention to perform them, but merely that the contents of the contract had been misrepresented and that he had not read the contract.

The court submitted as issues arising on the pleadings:

1. "Had the defendant association on 1 January, 1922, failed to secure signatures of tobacco farmers or persons eligible for membership covering at least one-half of the aggregate production of tobacco in North Carolina, Virginia, and South Carolina in 1920, as alleged in the complaint?" to which the jury responded "Yes."

2. "Was the signature of the plaintiff to the contract in controversy herein produced by the false and fraudulent representations of defendant, as alleged in the complaint?" to which the jury answered "No."

3. "Is the contract in controversy void for lack of mutuality on account of the difference in contract with F. A. Elks, as alleged in the complaint?" to which the court answered "No."

The court set aside the verdict on the first issue as a matter of law, and upon the second and third issues entered judgment that the plaintiff recover nothing. The plaintiff appealed.

Albion Dunn for plaintiff.

Burgess & Joyner, Jas. H. Pou, Stephen C. Bragaw, and Julius Brown for defendant.

Aaron Sapiro, E. L. Hayes, T. E. Bowen, and L. L. Levy of counsel for defendant.

CLARK, C. J. There was no error in setting aside the response to the first issue. The defendant association was duly organized by virtue of a statute, the legality of which has been affirmed by this Court in *Co-operative Assn. v. Jones,* 185 N. C., 265, and has been recognized in other cases. Its validity cannot be assailed in the manner thus attempted by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a *quo warranto* to vitiate the incorporation. Besides, there was no evidence of an insufficient sign-up, and if the plaintiff could have brought this collateral attack to vitiate the organization, the burden was upon him to produce evidence to that effect. The court properly set aside the verdict upon that issue.

Upon the second issue the jury have found that there was no fraud, and there was ample evidence to justify their verdict. The plaintiff, upon the uncontradicted evidence, was an early and earnest advocate of the association. He kept copies of the contract in his store, dis-

tributed them to his customers, and advocated and signed it. He had full opportunity to read the same.

It is needless to cite the many cases that would estop him as to the allegations that he did not know the contents of the contract. It is sufficient to cite *Griffin v. Lumber Co.,* 140 N. C., 514, and cases there cited, which hold: "Before signing a deed the grantor should read it, or if unable to do so, should require it to be read to him, and failure to do so, in the absence of any fraud or false misrepresentation as to its contents, is negligence, for the result of which the law affords no redress. But when fraud or any device is resorted to by the grantee which prevents the reading, or having it read, the rule is different." In this case the plaintiff was an intelligent man, an advocate of signing the contract in question, handed out the contracts to his customers and others asking them to read and sign it.

Upon examination of the instructions of the court upon the allegation of fraud we find no error. The court charged the jury that the plaintiff's reliance must have been reasonable, and there was no error in refusing to give the prayer requested.

In *Clements v. Ins. Co.,* 155 N. C., 57, the matter is fully discussed and there is no necessity of going over the well-settled law in a case where the plaintiff had the fullest opportunity to read the paper before signing and where there is no evidence that there was fraud or device to prevent him from reading the same.

There was no error in failing to give the specific instructions asked as to promissory or opinion representations. The charge was properly directed to the law applicable to the evidence relevant to the issues raised by the pleadings, and the instructions of the judge were sufficient under the ruling laid down in the recent case of *Williams v. Hedgepeth,* 184 N. C., 116; *Cash Register Co. v. Townsend,* 137 N. C., 655.

In *Pritchard v. Dailey,* 168 N. C., 332, the Court said: "The representations of the defendant seem to be what are called promissory representations, looking to the future as to what can be done to the property, how profitable it was, and how much could be made by the investment. Representations which merely amount to a statement of opinion go for nothing. One who relies on such affirmation made by a person whose interest might prompt him to invest the property with exaggerated value does so at his peril, and must take the consequences of his own imprudence. *Cash Register Co. v. Townsend,* 137 N. C., 652; Kerr on Frauds and Mistakes, 83."

A stronger case still is *Wilson v. Ins. Co.,* 155 N. C., 173, and *Hollingsworth v. Supreme Council,* 175 N. C., 615, and, in fact, all our authorities are uniform upon this point. The authorities are conclu-

sive that the judge committed no error in trying the issue of fraud and, besides, that the plaintiff failed to show that any fraud had been committed.

As to the first issue, as already said, there was no evidence to sustain the allegation that there was an insufficient sign-up; and, moreover, the certificate of the organization committee was conclusive upon the parties.

The assignments of error upon the allegation of mismanagement cannot be sustained. A member of a defendant corporation cannot take advantage of alleged mismanagement as a defense to his contract; and, besides, there was no evidence sustaining the allegation of mismanagement.

After a full and careful consideration of the entire case, we find

No error.

J. J. ADAMS v. ANGIER BANK AND TRUST COMPANY, INC., AND FRANKLIN T. DUPREE, TRUSTEE.

(Filed 5 March, 1924.)

Injunction—Usury—Equity—Pleadings—Demurrer—Evidence — Admissions.

In a suit to enjoin foreclosure of a mortgage upon the ground of usury, a demurrer to the complaint alleging the usurious charge admits its truth, and the injunction is properly continued to the hearing unless the defendant offers to reduce the charges to that allowed by law; and his defense, upon the ground that equity requires the plaintiff to tender the lawful amount of the debt, is untenable.

APPEAL from *Daniels, J.*, at November Term, 1923, of HARNETT.

The plaintiff alleged that on 1 April, 1920, he executed and delivered to the defendants a note in the sum of $3,500, which he secured by a deed of trust on certain tracts of land; that of this sum only $3,000 was lent him, the remaining $500 being a bonus for the loan; that the transaction was usurious and illegal; that the defendants knowingly charged the bonus with intent to collect it; that the defendants have advertised the land for sale under the deed of trust, and if it is sold the plaintiff will be irreparably damaged. He further alleged that a part of the debt had been paid.

The defendants demurred to these allegations on two grounds:

1. It is not alleged that the defendants or either of them are insolvent, and the equitable relief prayed cannot be granted until this is so shown.

2. That the plaintiff is seeking equitable relief to restrain the foreclosure of a trust deed upon the ground that usury was charged in the indebtedness secured by said trust deed, when in fact that it is not alleged that the plaintiffs or either of them have paid or offered to refund said indebtedness, or any part thereof, to the holder of the same, which contravenes the well-known equitable doctrine that "He who seeks equity must do equity."

The demurrer was overruled, and the plaintiff appealed.

J. R. Barbour for plaintiff.

F. T. Dupree and Charles Ross for defendants.

ADAMS, J. The defendants assign as error the judgment overruling the demurrer. They contend that the plaintiff is not entitled to equitable relief because he has neither paid nor tendered the principal and the legal interest thereon, and in support of their position they cite *Owens v. Wright,* 161 N. C., 127, and *Corey v. Hooker,* 171 N. C., 229. But these authorities do not aid the defendants. True, in each case it was held that equity will relieve against usury only upon payment of the amount actually received and the legal interest; but in the first of these cases the usurious charges were eliminated, and in the second it was said that when a mortgagor brings an action to restrain the mortgagee from selling mortgaged property on the ground that the debt secured is usurious, an injunction will be refused if the mortgagee waives the usurious part of the contract. In the present case the defendants have not waived their claim to the alleged usury, and it would be unconscionable to permit them to collect the amount actually due while insisting upon the payment of a bonus which by demurrer they admit is illegal.

The cause first assigned to defeat the plaintiff's equity requires no discussion.

In continuing the injunction, his Honor committed no error.

Affirmed.

THE EARLY & DANIELS COMPANY v. AULANDER FLOUR MILLS.

(Filed 5 March, 1924.)

Carriers — Railroads — Title — Consignor and Consignee — Actions — Damages—Order Notify Shipments—Vendor and Purchaser.

The title and right of possession remains with the consignor by common carriage, upon bill of lading attached to draft, order notify consignee, until the draft is paid and the shipment is accepted by him; and

where he has exercised his right to reject the shipment for shortage and damage *in transitu*, the consignor's right of action for the loss occasioned by the carrier's negligence is against the carrier, and not against the consignee.

APPEAL by plaintiff from *Lyon, J.*, at August Term, 1923, of BERTIE.

Civil action to recover damages for an alleged breach of contract relating to the sale by plaintiff and purchase by defendant of a carload of wheat.

Upon denial of liability and issues joined, there was a verdict for the defendant, and, from the judgment rendered thereon, plaintiff appeals.

Winston & Matthews for plaintiff.

Alexander Lassiter and Gilliam & Davenport for defendant.

STACY, J. Plaintiff and defendant entered into a contract whereby plaintiff agreed to sell and defendant agreed to buy 1,000 bushels of No. 2 red wheat at a stipulated price, same to be shipped by plaintiff from Cincinnati, Ohio, and delivered to the defendant at Aulander, N. C. Following exchange of telegrams between the parties, by which the contract of sale and purchase was consummated, with nothing said as to how the wheat should be shipped, plaintiff consigned to itself at Aulander, N. C., a quantity of wheat, loose in a car, with instructions to the railroad company to notify the Aulander Flour Mills upon its arrival there, and attached the bill of lading for said shipment to a sight draft drawn on the defendant for the purchase price of the wheat, which draft was sent through the banks for collection.

When the wheat arrived in Aulander, at least one-fourth of it was missing from the car, such loss apparently having been caused by a hole or crack in the bottom of the car, through which the wheat had "leaked" while in transit. There was also evidence tending to show damage to the wheat from rain.

Defendant declined to receive the shipment, on the ground that the wheat was materially deficient in quantity and quality from that called for in the contract. Plaintiff thereupon shipped the said wheat to Durham, N. C., and sold it at a sum less than the contract price. This suit is to recover the difference.

It is the position of the plaintiff that when it delivered the wheat in good condition to the transportation company in Cincinnati, its duty ceased, and the defendant must now look to the carrier for any loss or damage occasioned to the wheat while in transit. *Ober v. Smith,* 78 N. C., 313; *Crook v. Cowan,* 64 N. C., 743.

It is the general rule in mercantile law that the risk of loss follows the title to the property. *Joyce v. Adams,* 8 N. Y., 291; note 26,

L. R. A. (N. S.), 10. It is also the general holding that when a seller ships goods "order notify," and draws draft for purchase price, with bill of lading attached, the title and right of possession to the property are reserved by the seller until the draft is paid. No title passes to the purchaser, and any loss in transit, as between the buyer and the seller, must be borne by the latter. *Collins v. R. R., ante,* 141; *Watts v. R. R.,* 183 N. C., 12; *Penniman v. Winder,* 180 N. C., 73; *Richardson v. Woodruff,* 178 N. C., 46; 35 Cyc., 332.

Upon sufficient evidence, the jury have found, in answer to an issue submitted to them, that the defendant was justified in refusing to accept the wheat when it reached Aulander. 35 Cyc., 202; 23 R. C. L., 1420. The plaintiff, therefore, must look to the carrier, and not to the defendant, for any loss or injury to the wheat while in transit.

The record presents no reversible or prejudicial error; hence the verdict and judgment entered below must be upheld.

No error.

THE SNOW HILL LIVESTOCK COMPANY v. J. W. HOLLAND ET AL.

(Filed 5 March, 1924.)

Injunction—Mortgages—Liens—Questions for Jury—Appeal and Error.

There was evidence that the intervener, who had acquired from the plaintiff a purchase-money mortgage of defendant on two mules, the subject of claim and delivery, in turn had sold these mules to defendant and took a purchase-money mortgage thereon for the balance of the purchase price, and that thereafter the plaintiff sold defendant another mule, and to secure the balance of the purchase price took a mortgage thereon and on the two mules sold to defendant by the interveners and subject to the latter's mortgage, but registered subsequent thereto: *Held,* an instruction directing a verdict upon the evidence in intervener's favor, in effect that the intervener's mortgage lien was prior to that of plaintiff, was reversible error to the plaintiff's prejudice, its priority and validity to be determined by the jury upon the evidence.

APPEAL by plaintiff from *Horton, J.,* at December Term, 1923, of GREENE.

Civil action in debt, brought by plaintiff against the defendant, J. W. Holland, wherein an ancillary writ of claim and delivery was issued to recover certain personal property described in the pleadings, and upon which the plaintiff claims to hold a mortgage.

The defendant filed no answer, but J. C. Exum intervened, gave bond and took possession of the property, claiming title to the same by virtue

of a superior lien or prior mortgage. The issue, therefore, is one of priority between the plaintiff and the intervener as to the title and right of possession to the property in question.

There was a verdict for the intervener, and from the judgment rendered thereon plaintiff appealed, assigning errors.

Langston, Allen & Taylor and J. Paul Frizzelle for plaintiff.
George M. Lindsay for intervener.

STACY, J. The controversy as between the plaintiff and the intervener is over the prior claim and superior right to the possession of two mules. The essential facts are as follows:

1. The mules in question were sold by the Snow Hill Livestock Company to one J. H. Edwards on or about 10 January, 1914, and a title-reserved contract or mortgage to secure the purchase price of said mules was taken from said Edwards and duly registered. On or about 2 May, 1915, for value received, the Snow Hill Livestock Company assigned and transferred this purchase-money contract or mortgage to J. C. Exum, intervener herein.

2. Thereafter, on or about 1 September, 1917, the defendant, J. W. Holland, purchased said mules from J. C. Exum, or from J. H. Edwards with Exum's consent, and executed direct to J. C. Exum a chattel mortgage to secure the balance due on the purchase price of said mules. This mortgage was not registered until some time between 26 November, 1917, and 18 December, 1917. Exum contends that both mortgages are valid. This is denied by plaintiff.

3. On 24 November, 1917, the plaintiff sold to J. W. Holland another mule for $425, and, to secure the purchase price of same, took a mortgage on the mule sold and the two mules in dispute. This mortgage was duly registered on 26 November, 1917, prior to the registration of the Exum mortgage, mentioned in paragraph 2, above.

4. On 18 December, 1917, the defendant carried the mule back which he had purchased on 24 November, and exchanged this mule for another, valued at $400. It is the contention of the plaintiff that this exchange, by agreement, was not to affect the security given on 24 November, and the note of $425 was simply to be credited with a payment of $25. Intervener controverts this contention.

On the issue as to whether the intervener was the owner and entitled to the possession of the two mules in question, the court instructed the jury as follows:

"Now, as to the first issue, the court charges you, if you find from the evidence in this case, and by its greater weight, that, at the time these mules were seized under claim and delivery in this case, the

defendant Holland was indebted to the intervener, J. C. Exum, on either the first note executed by Edwards to the Snow Hill Livestock Company, and then transferred to Exum, or if indebted to J. C. Exum under the last two notes recorded in December, 1917, you will answer the first issue 'Yes.'"

We think this instruction must be held for error on plaintiff's exception. His Honor here in effect holds that the plaintiff's mortgage executed 24 November, 1917, and registered two days thereafter, is of no effect. Its validity and priority must be determined by the facts as found by the jury. To this end, let the cause be remanded for another hearing.

New trial.

MARY C. WILLIAMS v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 5 March, 1924.)

1. Carriers—Railroads—Crossings—Signals—Automobiles—Evidence.

Where there is evidence tending to show that the negligence of the employees on defendant railroad company's train was the proximate cause of a collision at a highway crossing with an automobile in which the plaintiff was a passenger, it is competent for the plaintiff to show that she was in a position and circumstances to have heard the warnings of the approach of the defendant's train, had they been given, and did not hear the warnings, in her action to recover damages for a personal injury.

2. Same—Evidence—Nonsuit.

Where there is evidence tending to show that a passenger in an automobile was injured in a collision at a highway crossing with defendant's track by the negligence of the defendant's employees in failing to give the required crossing signals or warnings, the question of contributory negligence is one of defense, of which the defendant railroad company cannot avail itself on its motion to nonsuit.

3. Same—Passengers—Contributory Negligence.

Ordinarily the negligence of the driver of an automobile will not be imputed to one riding therein unless he is the owner of the car or has control of the driver's movements in operating it. And where the evidence is conflicting as to whether the negligence of the railroad company proximately caused the injury to him, or whether it was so caused by the passenger therein, it raises a question for the jury to determine; and the fact that a passenger in an automobile at the time of the injury in suit was neither the owner of the car nor exercising control of the driver at the time of the negligent act, does not always preclude the determination of the issue as to contributory negligence as a bar to the action.

ADAMS, J., concurring in result; STACY and CLARKSON, JJ., concurring in the concurring opinion.

WILLIAMS *v.* R. R.

APPEAL by plaintiff from *Kerr, J.*, at October Term, 1923, of VANCE.

The plaintiff was traveling north as a guest of W. A. Brundige in his automobile, over the public highway between Franklinton and Henderson. They were both strangers and had never been over this road before. For several hundred yards south of the railroad crossing at which the injury occurred the public road runs parallel to the railroad and about 40 feet from it.

The track of the defendant approaches the crossing from the south through a cut, which was some 12 to 15 feet deep, about 400 yards from the crossing, but gradually diminished to the point where there was an embankment thrown up by the defendant company, between this track and the highway, of 4½ to 5 feet, extending to the crossing. On the top of this embankment, and on the bank of the cut, shrubs and bushes had been allowed to grow, thereby further obstructing from the view of a person on the highway a passing train.

The defendant's train, according to the evidence, was also traveling north and down grade at a high rate of speed, estimated by some of the witnesses at sixty miles an hour. It was out of schedule, being about an hour and a half late. There was evidence that it was making very little noise, and very little of it could be seen from the roadway, because of the cut, embankment and other obstructions, as the train approached the automobile almost directly from the rear. The automobile was traveling eighteen to twenty miles an hour, and turned abruptly to the left to cross the defendant's track, and was struck by defendant's train. There was evidence tending to show that there was no bell rung or whistle blown or other notice of approaching danger.

The plaintiff, the woman passenger, sixty-two years old, was hurled about 75 feet, both arms and one shoulder being broken, one knee-cap smashed, her skull fractured, her scalp being so badly cut that it fell over her eyes, and her nose cut and broken so that it dropped down over her mouth.

At the close of the plaintiff's testimony the defendant's motion for judgment as of nonsuit was granted, and plaintiff appealed.

Perry & Kittrell, T. T. Hicks & Son, and Kittrell & Kittrell for plaintiff.

Murray Allen and J. H. Bridgers for defendant.

CLARK, C. J. Exception 1 is to the refusal of the judge to allow the plaintiff to answer the question, "Were you in a position that you could have heard the signal whistle or bell if it had been sounded?" The answer of the witness would have been "Yes."

Exception 5 is to the refusal of the court to permit the plaintiff to answer the question, "Were you engaged in anything that would have distracted your attention?" The answer would have been "No." This evidence was sought to be elicited as tending to show that if defendant's train had given proper warning signals as it approached the crossing, the plaintiff was not engaged in anything that would have so distracted her attention as to prevent her hearing the signals if any had been given.

In *Goff v. R. R.,* 179 N. C., 219, this Court approved the principle laid down in *Edwards v. R. R.,* 129 N. C., 79: "The testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It tends to prove that neither the whistle nor the bell was sounded; but whether it does prove it is for them alone to decide."

The question whether the proper signals were given should have been submitted to the jury, and the answer to the questions were competent to go to the jury as tending to show negligence on the part of the defendant. The train coming up from the rear at sixty miles an hour, the engineer should have seen the automobile traveling immediately alongside the track, going in the same direction, and the engineer knew, which the occupants of the car did not know (for the testimony is that they had never been over the road before) that, a short distance ahead, the road, making a sharp turn to the left, would cross the track. It was the duty of the engineer, by proper signals, to have warned them of the rapid approach of the train, going in the same direction, and the evidence (which was excluded) that the plaintiff was in a position to have heard the signal whistle or bell, if it had been sounded or rung, and that she was not engaged in anything that would have distracted her attention, was competent for the jury to consider upon the allegation that no warning was given.

Exception 2 is that the judge permitted the plaintiff to be asked, and to answer, that she supposed the driver of the automobile would have taken precautions at the crossing if she had called his attention to it. The plaintiff, according to the evidence, was a guest of the driver of the car and had no interest in or control over it. The driver of the car is not a party to this action, and even if negligence on his part had been shown, it could not be imputed to the plaintiff. The only pertinence of the question and answer was in attempting to fix the plaintiff with the responsibility of the action of the driver. What she supposed or imagined the driver would do under these circumstances was not admissible.

"It has been repeatedly held that for a person to be responsible for the operation of an automobile, he must be the owner of the car which

is operated by some one under his authority and permission, or he must have control of the operation of the car." *Tyree v. Tudor,* 183 N. C., 346, which cites with approval *Duval v. R. R.,* 134 N. C., 333, where the Court held that the negligence of the driver of a public conveyance is not imputable to a passenger therein unless the passenger has assumed such control and direction of the vehicle as to be practically in control thereof, and the fact that the plaintiff was riding in a buggy driven by his father, as his guest, would make no difference as to legal liability.

Exception 6 presents the same question by permitting the defendant to ask the driver of the car, and the answer, whether if Mrs. Williams, who was riding in his car, had called his attention to the fact of the railroad track, he would have looked down the track in both directions.

Exception 7 is that the court permitted the defendant to ask W. A. Brundige, the owner and driver of the automobile, "If Mrs. Williams had requested you to stop the car upon her discovery that the train was coming, would you not have endeavored to stop it?" This was intended to impute to her responsibility for the conduct of the driver, without showing that she was in control of the machine, and is also a hypothetical question, for it was not shown that she had discovered the approach of the train.

The driver of the automobile had testified that he did not remember the circumstances, and he thinks that this was due in part to the shock which he received. The testimony is that Brundige was sixty-one years old and was thrown about 90 feet by the force of the collision. The effect of this upon his mental condition was competent as an explanation of his inability to remember accurately the details of the collision, and it was error to strike it out.

In addition to the above exceptions as to the admission or rejection of testimony, we think there was error in allowing the motion of the defendant for a nonsuit, and for the refusal of the court to submit to the jury the facts in connection with the collision and the manner in which the plaintiff was injured.

There is no evidence tending to show that the plaintiff, who was a mere passenger or guest of Brundige, saw the car being driven into the zone of danger. Besides, the question of contributory negligence upon the facts of this case does not arise upon this nonsuit; for if the evidence, taken in the light most favorable for the plaintiff, was sufficient to be submitted to the jury upon the issue, the evidence, if there had been any, of contributory negligence on the part of the plaintiff could not be considered.

Tyree v. Tudor, 183 N. C., at p. 346, quotes *Hunt v. R. R.,* 170 N. C., 442, where the Court said: "It is held by the greater weight of authority that negligence on the part of the driver of an automobile will not, as a

rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See the learned opinion on this subject by *Douglas, J.,* in *Duval v. R. R.,* 134 N. C., 331, citing *Crampton v. Ivie,* 126 N. C., 894; both of these discussions being approved in the more recent case of *Baker v. R. R.,* 144 N. C., 37-44." And further said that this had been approved in the then very recent case of *Pusey v. R. R.,* 181 N. C., 142, and added the following: "It has been repeatedly held that a person, to be responsible for the operation of an automobile, must be the owner of the car which is operated by some one under his authority and permission, or he must have control of the operation of the car, neither of which functions could be attributed to Ruth Tyree, who was a mere guest in the car, which was entirely under the control of Bynum Tudor, under the authority and by the permission of his father. The above proposition is sustained by unbroken authority in this State. Among other cases are *Linville v. Nissen,* 162 N. C., 95; *Taylor v. Stewart,* 172 N. C., 203; *Williams v. Blue,* 173 N. C., 452; *Clark v. Sweaney,* 175 N. C., 282; *Wilson v. Polk,* 175 N. C., 490."

In *Williams v. Blue, supra,* the Court said: "If it should turn out upon the trial that defendant, Fannie A. Blue, was exercising no control over the machine or chauffeur, and was occupying it simply as the wife of John Blue and with his consent, then she would not be liable. As to the defendant, Graham, . . . if it should turn out upon the trial that he did not assist in directing the operation and course of the machine at the time of the collision, he would not be liable." That case then quotes *Parker v. R. R.,* 181 N. C., 103, as affirming this uniform doctrine of our courts sustaining a verdict of $45,000 for damages sustained by a lady riding in her sister's automobile, where the same defense of contributory negligence was set up. The Court said: "As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver, if there was any, cannot be imputed to the passenger," citing numerous authorities. This is exactly the facts in the present case.

Tyree v. Tudor also cites 2 R. C. L., 207: "The prevailing view is that where the occupant has no control over the driver, even in a case where the relation of carrier and passenger does not exist, the doctrine of imputed negligence will not apply."

However, in this case, as already stated, upon a nonsuit sufficient appears to carry the case to the jury, and there is no evidence whatever

of contributory negligence on the part of the plaintiff, who was a mere passenger in a closed automobile driven by Brundige.

Of course, if there is not sufficient evidence of the negligence of the defendant to carry the case to the jury (which is the sole question on this nonsuit), and the negligence of the driver was the sole proximate cause of the collision, the passenger in the automobile who sustains injury cannot recover of the railroad. *Parker v. R. R., supra; Bagwell v. R. R.,* 167 N. C., 611. In such case there can be no liability on the part of the defendant.

Goff v. R. R., 179 N. C., 216, as already stated, cites the rule laid down in *Edwards v. R. R.,* that the failure to hear signals is sufficient to carry the case to the jury, and it was further held: "If his (plaintiff's) view is obstructed, or his hearing the approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if it was dangerous ahead, negligence will not be imputed to him, but to the company, failure to warn him being regarded as the proximate cause of any injury he received," citing *Mesic v. R. R.,* 120 N. C., 490; *Osborne v. R. R.,* 160 N. C., 309.

The defendant company owed to every one traveling along the public highway which will cross the defendant's tracks to maintain a safe crossing, and to warn travelers of the approach of its train to such crossing. Under all the circumstances of this case, there was certainly evidence to be submitted to the jury whether the negligence of the defendant was the proximate cause of the injury sustained. The plaintiffs were traveling an unknown road, whose crossing ahead was not known to them until they reached it and made a sharp turn to the left for that purpose. The train, which was coming up in the rear, was not known to them, whereas the driver of the train must have seen the automobile moving ahead of him along the road closely parallel to the train. The passengers in the automobile naturally would not be looking to the rear unless their attention was called to the approaching train by some signal. Their view, if they had looked in that direction, was obstructed for a part of the way by a cut, some 12 to 15 feet in depth, and even at the last moment by an embankment of 4½ to 5 feet, which has since been removed, and in addition to this obstruction there was the growth on the top of the cut and embankment.

Upon the whole case, it was error for the judge, by a nonsuit, to decide that the defendant was not in anywise in fault.

The defendant contends that the driver of the automobile in which the plaintiff was riding was guilty of negligence, in that he failed to listen or look, and that he approached the railroad at a greater rate of speed than ten miles an hour, and failed to observe the railroad track and the cross-arm signal. The question whether there was such failure was for the jury, and also, if there was such failure, whether that or the negligence of the engine driver was the proximate cause of the injury, was for the jury. The testimony of the driver is not that he failed to see the cross-arm sign, but simply that he does not remember seeing it, and that he did not know he was about to cross the track until after the accident. The evidence is that it was a new road to him, and it was a sudden right-angle turn in the road, which placed him on the track; and then there is testimony that, owing to the shock, he remembers very little about how the collision occurred. Besides, if there is evidence of the defendant's negligence as the proximate cause, evidence, if there was such, of this plaintiff's contributory negligence cannot be considered on the appeal from a nonsuit.

This was eminently a case in which the evidence should have been submitted to the jury to find upon the issues as to the proximate cause of the negligence by which two persons were so suddenly and seriously injured and another killed while traveling along the public road. The train was traveling down grade and at a terrific speed, which is fully shown by the fact that the driver was hurled 90 feet, that the body of his wife, who was killed, was thrown 105 feet, and the lady passenger (the plaintiff) was thrown 75 feet and sustained most serious damages. And, on the other hand, is the fact that the automobile was traveling along the public road, where it had a right to be, and that in crossing the track, on the same grade, the rights of the public are not subordinate to the railroad's, but coördinate with the prior rights of the public to use their own highways, each having its duties and each bound to observe the requirements. See *Kimbrough v. Hines,* 180 N. C., 285, 289, which recites, though in dissenting opinions, the rules, which were not disputed by any one, as to the relative rights of passengers and railroad companies at crossways. It may be added that, on the second appeal, in that case, after the fullest discussion, the plaintiff obtained the final judgment. *Kimbrough v. R. R.,* 182 N. C., 234.

It is also of sufficient interest to be noted here that, by the report of the State Highway Commission, of which as an official document we take judicial notice of the 288 grade crossings by railroad tracks which formerly existed over the State highway, there now remain over the 6,063 miles of State highway in the State only 180, and the State Highway Commission assures us that twenty-two of these will be eliminated by construction now under way; though of course there is a very great

number of other grade crossings over public, county and local roads, furnishing opportunity for sudden death or injuries to travelers along our roads.

In many of our States, and almost altogether in foreign countries, any grade crossing of the public roads by a railroad track is absolutely forbidden. The toll of life and injury to citizens using their own public roads by collision with high-powered, fast-moving engines owned and operated for private gain is a serious detriment to the public welfare and convenience, which some day must be finally and totally eliminated in the interest of the public in this State, as in so many others.

Certainly, upon the facts of this case, it was a matter for the jury, and not for the judge, to determine whether the proximate cause of this collision, and the resulting damages sustained by the passenger in the automobile, was caused solely by her own negligence or of Brundige, or whether the proximate cause was the negligence of the defendant. The plaintiff is entitled to a

New trial.

ADAMS, J., concurring in the result: The decisions heretofore rendered in this Court sustain these propositions as to the liability for negligence of the occupants of an automobile while traveling on a public highway.

1. Negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant unless such other occupant is the owner of the car or has some kind of control over the driver. *Tyree v. Tudor,* 183 N. C., 340, 346; *White v. Realty Co.,* 182 N. C., 536; *Pusey v. R. R.,* 181 N. C., 137; *McMillan v. R. R.,* 172 N. C., 853; *Bagwell v. R. R.,* 167 N. C., 611; *Baker v. R. R.,* 144 N. C., 37, 43; *Duval v. R. R.,* 134 N. C., 331; *Crampton v. Ivie,* 126 N. C., 894.

2. This principle may be subject to modification if the occupants are engaged in a joint enterprise. *Pusey v. R. R., supra.*

3. A person in charge of the operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is nevertheless liable for injury sustained by third persons by reason of its negligent operation, as the person actually operating the vehicle will be deemed his servant without regard to the question of employment. *Williams v. Blue,* 173 N. C., 452.

In *Tyree v. Tudor, supra,* it is said: "It has been repeatedly held that for a person to be responsible for the operation of an automobile he must be the owner of the car which is operated by some one under his authority and permission, or he must have control of the operation of the car."

I do not understand the preceding cases to have committed the Court to this proposition. Responsibility for the operation of an automobile, considered from a purely practical viewpoint, no doubt rests in a majority of cases upon him who owns or operates the car or permits another to use it; but I do not concur in the inference deducible from the foregoing quotation, which is cited in the opinion of the Court, that the contributory negligence of a guest may never bar his recovery against the chauffeur or the owner, or against a third party. Indeed, in *Baker v. R. R., supra,* there is strong intimation if not direct authority to the contrary.

JUSTICES STACY and CLARKSON concur in this opinion.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. J. L. BLAND.

(Filed 5 March, 1924.)

1. Contracts—Breach—Specific Performance—Co-operative Marketing—Statutes.

A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof.

2. Same—Injunction—Equity.

The right given by chapter 87, section 17c, Laws of 1921, to a tobacco marketing association formed under the provisions of said chapter 87, to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity.

3. Same.

A tobacco marketing association, formed under the provisions of the statute, upon the hearing as to continuing its temporary restraining order, must bring itself within the equitable principles applicable, and the temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court.

4. Same—Pleadings.

Upon the application of a tobacco marketing association formed under the statute for an injunction against its member from breaching his contract by failure to market his tobacco through the association, the defendant made it properly to appear upon the hearing as to continuing the preliminary restraining order that he had complied with his contract as far as he was able, but that the failure of the plaintiff to pay him for the large portion of his crop marketed through it under the terms of the contract forced him to market otherwise a small portion of his crop to raise money for supplies necessary for the support of himself and family: *Held*, the general denial by the plaintiff of owing the defendant anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient, and an order of the Superior Court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case.

CIVIL ACTION heard on return to preliminary restraining order at New Bern, N. C., at Fall Term, 1923, before *Horton, J.*

On the hearing there were facts in evidence on part of plaintiff tending to show that it was an association duly organized under chapter 87, Laws of 1921, having members who signed a standard form of contract obligating them to sell and deliver to plaintiff all the tobacco grown by them or held and acquired as landlord for the years 1922, 23, 24, 25, 26, and not otherwise, etc. That defendant as member signed said contract, and in breach thereof sold his tobacco crop for 1923 to the amount of 12,000 pounds to other persons, and avowed his purpose not to make further deliveries of his tobacco to plaintiffs, who pray an injunction to the hearing.

Defendant, admitting his membership in the association, offers evidence including his own specific averments under oath, to the effect that pursuant to his contract and obligation he delivered to plaintiff his entire tobacco crop for the year 1922, which, according to market prices generally available, was worth as much as $1,500. That for the year 1923 his crop amounted to 6,000 pounds, and of this he delivered to plaintiff two-thirds of same. That plaintiff is due to defendant on his crop for 1922, according to market prices available, as much as $700, and has wrongfully failed and refused under different pretenses to pay said sum to defendant or to properly account to him for the balance due on his tobacco crop of that year. That, being unable to obtain the balance due him or to maintain himself and family without it, defendant has sold the remainder of his 1923 crop for the purpose of obtaining necessary supplies for his support.

Defendant avers further that plaintiff in breach of the agreement, in the partial settlement which it has made on the crop of 1922, wrongfully withheld $36.80 as a penalty under the contract on tobacco from

plaintiff which tobacco belonged to one of defendant's tenants who was not a member of the association.

The plaintiff offered affidavits denying that it had wrongfully failed to account for the crop of 1922, but had acted in accord with the contract stipulations concerning the management and sale of said crop, and averred further that it had withheld the $36.80 as penalty for failure to deliver the tenant's crop, but since the decision of *Tobacco Assn. v. Bissett, ante,* 180, in denial of plaintiff's right to retain said money, plaintiff has offered to return or pay same to defendant, and is still ready to do so.

Upon these opposing averments the court gave judgment dissolving the injunction for the reason, among others, that plaintiff had wrongfully and in breach of its agreement withheld the $36.80, and further required defendant to enter into bond in the sum of $600 to save plaintiff harmless, etc., which said bond was duly given. Plaintiff excepted and appealed.

Burgess & Joyner and Moore & Dunn for plaintiff.
Aaron Sapiro, E. L. Hayes, and T. E. Bowen of counsel for plaintiff.
D. L. Ward for defendant.

HOKE, J. It is contended for defendant that further performance of the contract cannot be insisted on because plaintiff, in settlements to date for the crop of 1922, has wrongfully withheld $36.80 as penalty for nondelivery of certain tobacco of one of defendant's tenants, the latter not being a member of the association. In *Coöperative Assn. v. Bissett, ante,* 180, it was held that the withholding of this amount is not warranted by the law or the provisions of the contract, but on authority this breach is not of sufficient proportionate importance to justify an entire severance of the contract relation. *Brewington v. Loughran,* 183 N. C., 558; *Morrison v. Walker,* 179 N. C., 587; *Westerman v. Fiber Co.,* 162 N. C., 294.

In the latter case, the governing principle applicable is stated as follows: "It is not every breach of contract that will operate as a discharge and justify an entire refusal to perform further. Speaking generally to this question in Anson on Contracts, 349, the author says: 'But though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that relieves him from doing what he has undertaken to do. The contract may be broken wholly or in part, and if in part, the breach may not be sufficiently important to operate as a discharge.' In a contract of this magnitude, a default in respect to building eight or ten ordinary shacks to house the hands engaged in the business should not effect a complete discharge."

Again, it is contended that the contract is broken and defendant discharged from further obligation thereunder by reason of the wrongful failure of plaintiff to settle properly for the crop of 1922, defendant's evidence tending to show that he delivered his entire crop for that year to the value of $1,500, and has been paid thereon only $800, and that plaintiff has wrongfully failed and refused to account further. Such a breach if properly established might well amount to a destruction of the contract, relieving defendant from further performance, but in our estimate and on the evidence as now presented the pertinent facts are not sufficient to support the position.

From a proper perusal of the standard form of contract, as signed by defendant, it appears that plaintiff is not allowed as of right the entire life of the contract in which to market the member's crop and account to him for its proceeds, but is to sell to the best advantage according to the dictates of good judgment and business prudence. The general policy to be pursued here and as contemplated by the statute is wisely foreshadowed by the *Chief Justice* in his valuable opinion in *Coöperative Assn. v. Jones,* 185 N. C., 265, as follows: "The contract does not contemplate that the association will hold over the crops raised in one or more successive years, such being destructive of the purpose of the association as contemplated by the statute. The plaintiff will continue to exist only if it provides for a normal, orderly marketing of the tobacco crops and by putting on the market of the world annually the production of that year." While this is the correct principle and the general rule of conduct to be pursued and affords a proper setting for a correct construction of the agreements, there is no precise time fixed in the contract for making the sale, and this is left largely to the sound discretion of the directors or the appropriate governing body of the association; a discretion, however, that is not to be exercised arbitrarily but fairly and reasonably, having due and proper regard to the purposes of the organization and the conditions and circumstances prevailing at the time, and if it should be established that the management, unmindful of its duties, should attempt to exercise the powers entrusted to them in bad faith or for ulterior purposes, or there should be such unreasonable delay in marketing the crop or accounting for same that bad faith could be inferred, such conduct going, as it does, to the essentials of the agreement, could well be held to destroy the contract and relieve the members from further performance.

While we are of opinion, as stated, that the facts as now presented would not uphold a finding of bad faith on the part of the association and its management, it does not at all follow that on this record the court should continue an injunction to the hearing in aid of plaintiff's suit.

We are not unmindful here of the provision in the statute under which plaintiff is organized, to the effect "That in the event of a breach or threatened breach of the contract, plaintiff should have a right to relief by specific performance, and to an injunction when reasonably required in the assertion and protection of its rights under the contract. And further, that in filing a bond and verified complaint, showing a breach or threatened breach, a preliminary restraining order should issue. Laws of 1921, ch. 87, sec. 17c. But the purpose and meaning of this section is principally to put beyond question the fact that plaintiff in these suits should have the remedy specified to be available under the general principles applicable, and that the closing clause, which provides for a preliminary injunction on the mere filing of a verified complaint, refers only to the initial process and does not and is not intended to withdraw from the courts the right to decide these causes under approved principles of law. Any other interpretation would be to threaten the validity of the act, or this portion of it, as an unwarranted interference by the Legislature with powers that are strictly judicial, a construction that courts do not readily adopt. Black's Handbook on American Constitutional Law, citing Cooley on Constitutional Limitations, 96; *Clapp v. Ely,* 27 N. J. L., 622, and Black's Constitutional Law (3 ed.), 66.

Considering the record, then, in view of the general principles which should prevail in such cases, it is recognized that one who invokes in this way the equitable powers of the court for the protection of his rights must not, by his own breach of duty, have caused the injuries or threat of them, of which he complains, a position to some extent embodied in the more familiar maxim "that he who comes into equity must do so with clean hands."

Again, as probably more pertinent to the instant case, it is an accepted ruling that an injunction will not usually be granted or continued where "it will do more mischief and work greater injury than the wrong which it is asked to redress." *Mfg. Co. v. McElwee,* 94 N. C., 425; *American Smelting Co. v. Godfrey,* 158 Fed., 225, reported also in 14 Ann. Cas., 8; 14 R. C. L., 353-357; Title Injunctions, secs. 56-60; 1 Joyce on Injunctions, secs. 117-118.

In *American Smelting Co. v. Godfrey, supra,* the annotator in 14 Annotated Cases, at p. 19, states the principle as follows: "It may be stated as a general rule that in determining whether to grant an injunction it is the duty of the Court to consider the inconvenience and damage that will result to the defendant as well as the benefit that will accrue to the complainant by granting the writ." And further, in illustration: "Upon balancing the conveniences, if it appears that an injunction would be productive of greater injury than would result from its denial, it should not be granted."

And in the citation to R. C. L., sec. 60, *supra,* it is said, among other things: "But the Court is not bound to make a decree that will do more mischief and work greater injury than the wrong it is asked to redress. The comparative convenience or inconvenience of the parties from granting or withholding the injunction sought should be considered, and none should be granted if it would operate oppressively or inequitably or contrary to the real justice of the case."

From a perusal of the evidence it appears that defendant, acting in accord with his contract, delivered to plaintiff his entire tobacco crop for 1922; that he delivered two-thirds of his crop for 1923, and owing to failure on part of plaintiff to properly account for and pay over the balance due from the sales of 1922, amounting to about $800, he was compelled to sell the remaining one-third of the 1923 crop to raise money for the necessary supplies of himself and family.

True, plaintiff has made denial as to the amount due on the crop of 1922, or that there is anything due, but considering the fact that plaintiff kept or should have kept proper entries showing what had been done with the crop of 1922, and that plaintiff or its officers and agents had access to its book, its statements as to the disposition of the crop of 1922 and its denial of the amount due are entirely too general for a court to look with favor or to act on them. We think, therefore, that a proper application of the principles above stated is in full support of his Honor's judgment dissolving the restraining order in this case, on defendant's giving proper bond, and leaving the parties to have the litigated questions between them determined at the hearing.

The disposition made of the present appeal in no way conflicts with the decisions made in *Tobacco Assn. v. Battle, ante,* 260; *Tobacco Assn. v. Patterson, ante,* 252; and *Tobacco Assn. v. Spikes, post,* 367. In those cases defendants had denied their membership and were in an attitude of resistance towards the contract and any and all of its obligations, and in such case, in our opinion, the writ was required to conserve and protect the rights of plaintiff pending litigation, while here the defendant, as far as he could reasonably do so, has acted in perfect loyalty to the contract and was doing his best to perform, and the damage threatened by its issuance far surpasses any injury to be expected from a denial of the writ.

The judgment as entered below is in accord with correct equitable principles and same is

Affirmed.

CHARLES HARVEY AND WIFE, SUSAN HARVEY, v. C. W. BROWN AND WIFE ET ALS.

(Filed 5 March, 1924.)

1. Evidence—Nonsuit—Motions.

Upon defendant's motion to nonsuit, the evidence will be construed in the light most favorable to the plaintiff.

2. Same—Deeds and Conveyances—Mortgages—Fraud.

Where the mortgagee takes a mortgage in good faith, without notice of fraud alleged in prior negotiations respecting the lands conveyed by him under foreclosure sale to an innocent purchaser without notice, the mortgagee's deed will convey a good title.

3. Fraud—Evidence—Deeds and Conveyances—Mortgages—Sales.

Where a deed to a purchaser at a foreclosure sale under a mortgage and preceding conveyances in relation thereto are sought to be set aside for fraud, testimony of a witness of his opinion as to the facts constituting the alleged fraud of the mortgagee or otherwise than by his admission, is incompetent.

APPEAL by Susan Harvey from *Bond, J.,* at November Term, 1923, of PASQUOTANK.

This is a civil action brought by Chas. Harvey and wife, Susan Harvey, against C. W. Brown and wife, Catherine W. Brown, C. E. Thompson, D. H. Tillett and J. C. Brooks. The plaintiffs allege that Chas. Harvey owned a house and lot in Elizabeth City, on Culpepper Street. He and his wife, Susan Harvey, on 8 December, 1914, executed to the defendant J. C. Brooks a mortgage to secure the sum of $325, with power of sale in default of payment. That prior to 18 March, 1916, the defendant C. W. Brown approached the plaintiffs to purchase the house and lot, and thereafter, on said date, they sold the house and lot to C. W. Brown for $50 and made a deed for same, with the understanding and agreement that C. W. Brown would pay off the mortgage indebtedness held by defendant J. C. Brooks, consisting of three mortgages and the further agreement that the plaintiffs should have a life estate in the house and lot. A deed was made in June, 1918, to plaintiffs by C. W. Brown for a life estate in the property. It is alleged that C. W. Brown not only wrongfully and fraudulently failed and refused to pay off the J. C. Brooks mortgages, but had Brooks, secretly and without notice to plaintiffs, to advertise and sell the house and lot and employed C. E. Thompson, an attorney, to bid in the property for him at the sale. The sale was made on 1 February, 1919, and the property brought $500. In pursuance to an arrangement with C. W. Brown, the property was deeded by Thompson on

6 February, 1919, for consideration of $10 to the defendant Catherine W. Brown, wife of C. W. Brown.

It is further alleged that Brown wrongfully and fraudulently suffered and procured the sale and failed to comply with his agreement. That Catherine W. Brown knew the facts regarding the sale and the agreement between the plaintiffs and C. W. Brown. That Thompson paid nothing for the land, but bought it as attorney for C. W. Brown. That Catherine W. Brown held the title to the land for the defendant C. W. Brown, never having paid the purchase-money. That Brown caused the sale to defeat plaintiffs' life estate. That on 7 February, 1919, Catherine W. Brown and C. W. Brown, to secure a loan of $500, made a mortgage to D. H. Tillett on the house and lot. That the said Tillett had notice and knowledge of the rights of plaintiffs. That the said Tillett advertised and sold the property, according to the terms of his mortgage, on 27 March, 1920, and at the sale W. L. Cahoon became the last and highest bidder in the sum of $1,255. That the said Tillett had no right to make the sale and convey title.

The plaintiffs pray and demand that the sale be not confirmed and that no title be passed; that the deed made by J. C. Brooks to C. E. Thompson, and by C. E. Thompson and wife to Catherine W. Brown, and by C. W. Brown and Catherine W. Brown to D. H. Tillett be canceled and set aside, and that the defendant Tillett be enjoined from selling the life estate of plaintiffs in the property. That the defendants C. W. and Catherine W. Brown be declared to own no interest in the property except a remainder after the death of plaintiffs. That no title be conveyed that will affect the life estate of plaintiffs, and such other and further relief, etc.

Defendant J. C. Brooks denies all knowledge of any agreement between C. W. Brown and plaintiffs. He says that Brown paid him a portion of the indebtedness due him by the plaintiffs, and he assigned the notes without recourse to Brown; that the sale was made under his mortgage and at the request of the defendant C. W. Brown, and the property was purchased at public sale by C. E. Thompson for $500, who was the last and highest bidder. That Thompson paid the purchase price and he made him a deed. All other allegations are denied.

Defendant C. E. Thompson denies all knowledge of any agreement between C. W. Brown and plaintiffs. He says that prior to 1 February, 1919, he was employed by C. W. Brown to appear at the sale made by Brooks and bid in the house and lot for the defendant Catherine W. Brown, and that he did this. Brooks made a deed to him and, pursuant to the terms of his employment, he made a deed to defendant Catherine W. Brown. All other allegations are denied except that he has been advised of the mortgage made by C. W. Brown and wife, Catherine W.

Brown, to D. H. Tillett, and advised of the purchase of the property by W. L. Cahoon at the Tillett sale.

Defendant D. H. Tillett denies all knowledge of any agreement between C. W. Brown and plaintiffs. He says that C. W. Brown and wife, Catherine W. Brown, on 7 February, 1919, executed a mortgage to him to secure a loan of $500. That the loan was not paid and he sold the property at public sale on 27 March, 1920, at which sale W. L. Cahoon was the last and highest bidder in the sum of $1,255. That Cahoon has declined to take the property on account of this suit. That he had the right and authority to sell the property, and the sale made by him was good and valid to pass the title in fee to the property.

Since the suit C. W. Brown has died and his widow, Catherine W. Brown, for herself and as administratrix of C. W. Brown, answers the complaint. She denies all knowledge of an agreement between C. W. Brown and plaintiffs, especially and particularly denies any and all participation in any fraud on her part individually and in behalf of herself as administratrix or understanding as alleged by plaintiffs. Denies any knowledge or understanding or agreement on the part of C. W. Brown or herself to convey said property to the plaintiffs by another deed or a life estate therein, or to pay off and discharge the mortgages. That C. W. Brown had money of hers which he, from time to time, invested, and she denies that she never paid any part of the purchase-money. That the mortgage made to D. H. Tillett was in good faith, and the sale made by Tillett was *bona fide* in all respects. That the plaintiffs are in the wrongful possession of the property, etc. This was denied by plaintiffs.

Chas. Harvey has died since this suit was instituted.

The case came on for trial in the court below, and during the trial the plaintiff took a voluntary nonsuit as to the defendants J. C. Brooks and C. E. Thompson. The other defendants moved for nonsuit as to them at the close of the evidence, which was granted. The plaintiff excepted and assigned this as error and appealed to this Court.

Aydlett & Simpson for plaintiff.

W. L. Small and Ehringhaus & Hall for Catherine W. Brown, individually and as administratrix.

Thompson & Wilson for D. H. Tillett.

CLARKSON, J. Upon a motion to nonsuit, the evidence is to be taken in a light most favorable to plaintiff. From a careful examination of the record we think that D. H. Tillett took the mortgage made to him in good faith and without notice, and the sale made by him under its terms was good and valid to pass the title in fee simple to the house

and lot. We think the court below made no error in granting the nonsuit. *Hinton v. Hall,* 166 N. C., 477; *Brewington v. Hargrove,* 178 N. C., 146; 27 Cyc., 1494.

The other assignments of error were exceptions to the testimony of C. E. Thompson. He had purchased the land under the mortgage sale of J. C. Brooks and was sued by plaintiffs. A nonsuit was taken as to him and he was made a witness by plaintiff. He testified that he bid the property in for Catherine W. Brown at the request of C. W. Brown. He made the deed to her and got the money from her to pay for the house and lot. In the direct examination he said: "I do not know that the money gotten from Mr. Tillett was paid over to me as the purchase-money. I know nothing of the Tillett loan of my own knowledge. The only information that I have as to that I got from C. W. Brown and afterwards from Mr. Tillett himself. Some time afterwards Mr. Tillett told me that he had loaned C. W. and Catherine W. Brown $500 on the Harvey property." On cross-examination he said: "I was present at the sale by Mr. Brooks. It was absolutely fair and open; several were bidding on the property. . . . I knew nothing of any agreement or arrangement between C. W. Brown and Chas. Harvey and his wife. I did not know of any agreement that he should pay off the Brooks mortgage. There was nothing on record to call the matter to my attention, and I had no information from any one concerning it that there was any such agreement."

On recross-examination Thompson testified:

"I did not tell Mr. Tillett about any agreement between Brown and Harvey, and no one else informed him in my presence. I did not tell Mr. Tillett nor did any one in my presence about any agreement between Brown and the Harveys, if there ever was any such agreement, whereby Brown was to pay off the Brooks mortgage. I did not know of the agreement myself until long after Mr. Tillett became interested in the property, nor did I know of the conveyance from Harvey to Brown until long after Mr. Tillett became interested. At the time of making the loan to Catherine W. Brown, Mr. Tillett told me about having made the loan at some time subsequent to that; he told me his first knowledge of the agreement which is on record was after the institution of this suit. It was evidently after the institution of the suit that he told me of the agreement on record, and he had told me of the loan to Catherine W. Brown at the time it was made or soon thereafter."

To this and similar evidence plaintiff excepted and assigned as error.

It will be noted on the direct examination that this matter was brought out by plaintiff. Thompson testified that the only information as to the Tillett loan was what he (Tillett) told him. Under the

facts and circumstances in this case, on cross-examination, we think the evidence was competent. The plaintiff was trying to show that the Tillett loan was made with notice. The defendant was trying to show to the contrary. Tillett was a party defendant. We think the evidence goes as far as permissible to prove any circumstance calculated to throw light upon the intent of Tillett, and that he had no notice. It does not militate against the principle laid down in *Durrence v. Northern Nat. Bank,* 43 S. E., 726; 117 Ga., 385, where it is said:

"The only remaining ground of the motion for new trial complained that the court refused to permit Brewton to testify that H. J. Durrence bought the land 'in good faith and without notice of the deed from' Brewer to Craig & Co. From the brief of evidence it appears that the witness was allowed to testify that, so far as the witness knew, Durrence had no notice of the title of Craig & Co. The ruling of the court, excluding the evidence above set out, was correct. While a vendee may testify that he bought without notice (*Hale v. Robertson,* 100 Ga., 168; 27 S. E., 937), no one else can do so, though such other witness may testify as to facts tending to show that the vendee had no notice, and especially that he had no notice from the witness. It is not competent for a witness to testify directly as to another's intention. *Cihak v. Klekr,* 117 Ill., 643; 7 N. E., 111; *Manufacturers Bank v. Koch,* 105 N. Y., 630; 12 N. E., 9; 1 Jones Evid., sec. 167; *Gardom v. Woodward* (Kan.), 21 Am. St. Rep., 314, note (*S. c.,* 25 Pac., 199). Brewton testified that, so far as he knew, Durrence bought without notice. To allow him to state, without qualification, that the vendee had no notice whatever from any source, would be to allow him to testify as to a matter which he could not possibly know to be true. So, while a vendee may be allowed to testify as to his own good faith, this is something which no one else can possibly know, and to which, therefore, no one else should be allowed to testify directly." Wigmore on Evidence (2 ed.), sec. 661; *Wolf v. Arthur,* 112 N. C., 692; *Stanley v. Lumber Co.,* 184 N. C., 306; *S. v. Journegan,* 185 N. C., 707.

We are of the opinion that there was no sufficient evidence to show that either Thompson or Tillett took with notice of the alleged agreement between plaintiffs and C. W. Brown. C. C. Drew testified as follows as to this agreement: "They lived at this place before the death of Charles Harvey; I went to the place with C. W. Brown to see them before the deed was made. Charles Harvey was sick in bed. I married the plaintiff's daughter. I did not administer on his estate. I went out there with Brown to see them, and had a conversation, which was before the deed was made. Brown said he would give them fifty dollars and give them their life estate in the property, giving them a

deed. They told them they owed Mr. Brooks and were unable to pay him, and were hunting relief. He agreed to intervene and take up the mortgages."

If there was an agreement between plaintiffs and C. W. Brown that he would pay the Brooks mortgages and give them a life estate in the property, and in pursuance of this agreement the plaintiffs made a fee-simple deed to C. W. Brown, and he in turn deeded a life estate to Chas. Harvey and wife, Susan Harvey, but in breach of his contract procured the Brooks mortgage to be foreclosed, Chas. Harvey having died, the life estate survived to his wife, Susan Harvey (*Turlington v. Lucas,* 186 N. C., 286), and she could recover damages for the breach of the contract. *Parlier v. Miller,* 186 N. C., 501. For the reasons stated the judgment is

Affirmed.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. PETE SPIKES.

(Filed 5 March, 1924.)

Injuction—Co-operative Marketing Associations.

In this suit for an injunction by a tobacco growers association, incorporated under the provisions of the statute, against its alleged member for selling his tobacco in violation of his contract, depending largely upon the question of his membership: *Held,* the restraining order should be continued to the hearing under the authority of *Tobacco Association v. Battle, ante,* 260.

CIVIL ACTION heard on return to preliminary restraining order before *Horton, J.,* at New Bern, N. C., on 9 October, 1923.

There was judgment dissolving the restraining order on giving a one-hundred-dollar bond, and plaintiff excepted and appealed.

Burgess & Joyner and Moore & Dunn for plaintiff.

Aaron Sapiro, E. L. Hayes, T. E. Bowen, and Emma T. Koen of counsel for plaintiff.

R. W. Williamson for defendant.

HOKE, J. On the hearing there were facts in evidence on part of plaintiff tending to show that plaintiff is an association duly organized under chapter 87, Laws of 1921; that defendant had become a member and signed the standard form of contract by which he was obligated to sell and deliver to plaintiff all tobacco grown by him or acquired as landlord during the years 1922, 23, 24, 25, 26, and that in breach

of his agreement he had sold his tobacco crop for 1923 to others. Defendant denied his membership and disavowed any and all obligation to deliver.

The Court has held that the act under which plaintiff is organized is constitutional, that the standard form of contract signed by its members is valid and enforceable by specific performance, and that ordinarily an injunction lies when it appears to be reasonably necessary to protect and conserve plaintiff's rights under the contract. *Coöp. Assn. v. Jones,* 185 N. C., 265; *Tobacco Assn. v. Battle, ante,* 260, and *Tobacco Assn. v. Patterson, ante,* 252.

In the present case it appears that the questions at issue depend largely on defendant's membership, and three witnesses for plaintiff having sworn he was a member, and for defendant the fact he denied only by his own affidavit, there being no claim or evidence *ultra,* the case comes directly under *Tobacco Assn. v. Battle, supra,* and the restraining order should be continued to the hearing.

Reversed.

G. J. CHERRY ET AL. V. IDA B. HODGES ET AL.

(Filed 5 March, 1924.)

Instructions—Appeal and Error.

Exceptions to a disconnected portion of a charge will not be held for error; when taken in connection with other parts of the charge it correctly applies the law to the evidence upon the trial.

APPEAL by plaintiffs from *Connor, J.,* at October Term, 1923, of WASHINGTON.

Civil action to recover damages for an alleged wrongful trespass and for restraining order to prevent further trespassing in the future.

Upon denial of liability and issues joined, there was a verdict and judgment for the defendants, from which the plaintiffs appeal, assigning errors.

Van B. Martin and Aydlett & Simpson for plaintiffs.
W. L. Whitley for defendants.

PER CURIAM. The controversy, on trial, narrowed itself principally to questions of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been tried substantially in conformity to the law bearing on the subject, and no sufficient reason has been found for disturbing the result below.

Appellants' chief exceptions relate to the admission and exclusion of evidence and to portions of the charge. We have found no ruling or action on the part of the trial court which we apprehend should be held for reversible error.

It is now settled law that the charge of the court must be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge should be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties.

The verdict and judgment must be upheld.

No error.

J. G. CAHOON v. C. R. EVERTON.

(Filed 5 March, 1924.)

1. Pleadings—Verification—Signature of Pleader.

It is not vitally necessary that a party sign the verification to his pleadings, though the practice that he do so is commended. C. S., 529.

2. Pleadings—Clerks of Court—Jurisdiction—Judgments—Default of Answer—Statutes.

Where the plaintiff is entitled to a judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil-issue docket for trial. Chapter 92, Public Laws 1921, Extra Session.

3. Same—Amendments—Superior Courts—Trial Judge.

Where the plaintiff has waived his right to a judgment by default before the clerk, and the cause has been transferred to the civil-issue docket for trial, the trial judge has the authority, under the provisions of C. S., 536, to allow the defendant to amend his answer.

4. Same—Issues Joined.

The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil-issue docket when the issue has been joined within ten days from the commencement of the term. C. S., 557, amended by chapter 124, Public Laws 1923.

5. Pleadings—Actions—Debt—Sufficiency of Answer—Issues—Statutes.

Where the complaint alleges an action of debt, an answer denying the debt *is held* sufficient, under section 535, C. S. *Chesson v. Lynch*, 186 N. C., 625, applied to the facts of this case.

APPEAL by defendant from *Allen, J.*, and a jury, at August Term, 1923, of TYRRELL.

This was a civil action, brought by plaintiff against defendant.

The first section of the complaint alleges "That the defendant, C. R. Everton, is justly indebted to the plaintiff, J. G. Cahoon, in the sum of $678.98 for merchandise sold and delivered to the defendant, as shown by itemized account, thereto attached and made a part of this original complaint, and marked 'Exhibit A.'"

The second section alleges "That there is no counterclaim or set-offs against the same; that all of the same is now due and unpaid; that the plaintiff had demanded the same of the defendant, and payment has been refused."

The defendant, answering the first section of the complaint, says: "That section 1 is hereby denied, and that he does not owe the plaintiff any such sum of money."

In answer to the second section he says: "That section 2 is denied; that there has been no demand and refusal to pay sum alleged."

The summons in the cause is dated 18 July, 1923, returnable 1 August, 1923. It and the complaint were served 27 July, 1923, on the defendant. The record shows that the complaint was "sworn and subscribed to before me, this 18 July, 1923." The oath was administered by the clerk, but the plaintiff did not subscribe his name to the oath.

The answer of the defendant was sworn to on 18 August, 1923, and was filed on 20 August, 1923. Superior Court of Tyrrell County for civil cases began on Tuesday, 27 August, 1923.

In the Superior Court the following order was made:

"It appearing to the court that the answer to sections 1 and 2 is too indefinite and uncertain, it is ordered that he make the same more definite and certain at this term of the court; and he is given until tomorrow morning at 9 o'clock to do so."

It appears from the record that the defendant's counsel claimed the defendant was sick and they were unable to comply with the order. It further appears:

"The court heard the evidence as to the condition of the defendant about 3 o'clock today, but had previously notified the defendant's counsel as early as Monday evening, when the calendar was examined, that the case would likely be tried, and requested that they notify their client.

"The court, meaning no reflection upon the counsel in the case, finds as a fact that the defendant came to Columbia Monday night, saw his counsel, and returned to his work, about fourteen miles away, and on Tuesday returned to his home, about twenty miles from here, claiming to be sick. The court, after carefully examining his witnesses as to his sickness, is not satisfied that he is too sick to attend court, and therefore further finds that the answer which he has disclosed to his counsel is also frivolous, and therefore stricken out, no physician's certificate being produced, and the physician who attended him two weeks ago being in court."

The defendant excepted to this order, and assigned error.

"The denial is based upon the fact that the defendant has been here this week and seen his attorneys, and has written an intelligent letter to his counsel, which letter is attached and marked 'Exhibit A.' The counsel are not sufficiently informed to make the pleading more definite, but say they believe that they can make the answer more definite. Motion by defendant for continuance, on the ground that the action has not been at issue for but seven days. Motion denied."

The defendant excepted and assigned error.

The cause was tried and a verdict rendered for plaintiff, and judgment signed for plaintiff in accordance with the verdict. Defendant's counsel did not participate in the trial before the jury. Defendant excepted and assigned error, and appealed to this Court.

T. H. Woodley and Aydlett & Simpson for plaintiff.
Swain & Norris for defendant.

CLARKSON, J. The defendant takes the position that the complaint was not verified according to law, as the plaintiff, when he swore to the complaint, did not subscribe his name to the oath. We do not think this necessary, under the statute, although the better practice is to have it subscribed. C. S., 529, is as follows:

"The verification must be in substance that the same is true, to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or, if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides, and is capable of making the affidavit." *Currie v. Mining Co.*, 157 N. C., 218.

We commend what *Merrimon, J.*, said, in *Alford v. McCormac*, 90 N. C., 153: "While the law is as we have expounded it, the general prac-

tice in this State has been to require the affiants to subscribe their names to the affidavits made by them. This is a wholesome practice, and we commend it. It ought to be observed by all officers who take affidavits for any purpose, not because it is essential, but because it serves to supply strong additional evidence that the affiant swore what is set down in writing, in case it should at any time be brought in question. The certificate of the officer taking it is official, but not conclusive, evidence of what appears to have been sworn. As we have said, it is sometimes required by statute that affidavits shall be subscribed by the parties making them. Of course, in such cases they would be incomplete and inoperative without the signature of the affiant subscribed by him."

The exceptions raise some interesting questions under our practice. It will be seen from the record that the summons is dated 18 July, 1923, returnable 1 August, 1923. It and the complaint were served on defendant 27 July, 1923.

Public Laws, Extra Session 1921, ch. 92, sec. 1, subsec. 3, is as follows: "The answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint upon each of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing complaint, then the defendant shall have twenty days after the final day fixed for such extension in which to file the answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond twenty days after such service): *Provided,* in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain."

The twenty days for defendant to answer expired before 20 August, 1923. The answer was filed on 20 August, 1923. The plaintiff did not move for judgment by default before the clerk, as he had a right to do. *Lerch v. McKinne,* 186 N. C., 244.

The case was transmitted to the Superior Court, at term, for trial on the issues. Subsection 13, Laws 1921, *supra,* is as follows:

"Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force."

When the case reached the Superior Court, at term, it was treated as rightfully there and the answer filed in time. The court recognized the answer as properly filed in time, and made an order to make sections 1 and 2 of the answer more definite and certain.

In *McNair v. Yarboro,* 186 N. C., 113, it is said: "And we consider it well to state further that, while this chapter 92, section 3, provides that 'where a copy of the complaint has been served upon each of the defendants, the clerk shall not extend the time for filing answer beyond twenty days after such service.' This restriction applies to the clerk and does not and is not intended to impair the broad powers conferred on the judge in this respect by section 536 of Consolidated Statutes, to the effect that where the cause is properly before him 'he may, in his discretion and upon such terms as may be just, allow an answer or reply to be made or other act done after the time, or by an order to enlarge the time.'"

The plaintiff, having made no motion before the clerk for judgment by default, on account of the answer not being filed in time, and allowed the case to be transmitted for trial on the issues at term, waived his right; and the fact that the answer was not filed before the clerk in time will be considered waived, under the facts and circumstances of this case. The court below treated it as filed in time, and made the order as set out in the record.

The next question arises from the exception and assignment of error, as follows: "Motion by defendant for continuance, on the ground that the action has not been at issue for but seven days." The answer was filed on the 20th; that was seven days before the court convened.

C. S., 557, amended by chapter 124, Public Laws 1923, is as follows: "Every issue of fact joined on the pleadings, and inquiry of damages, or ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order."

We think, as a matter of right, the defendant was entitled, under the statute, to a continuance.

C. S., 535, is as follows: "In the construction of pleadings for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Under our liberal practice, we think the answer was sufficient to raise an issue. *Chesson v. Lynch,* 186 N. C., 625.

For the reasons given, there must be a

New trial.

R. C. BRIDGER v. J. R. MITCHELL.

(Filed 12 March, 1924.)

Summons—Service—Process—Publication—Nonresidents—Judgment in Personam—Special Appearance—Jurisdiction—Judgments set Aside.

Where a nonresident defendant of this State has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of our statute, C. S., 411, may not be rendered against him *in personam*, in an action for debt; and where so rendered it will be set aside upon special appearance of his attorney who moves therefor upon the ground of improper service, and the want of jurisdiction of our courts.

APPEAL by plaintiff from *Kerr, J.*, at October Term, 1923, of HERTFORD.

Civil action.

Stanley Winborne and R. C. Bridger for plaintiff.
John E. Vann for defendant.

CLARKSON, J. This is an action on a judgment obtained by plaintiff against the defendant at April Term, 1913, of the Superior Court of Hertford County, for the sum of $800, with interest from 25 April, 1913; cost, $92.65, and cost of the action.

The suit was commenced in Hertford County, and the usual summons in such cases issued to the sheriff of said county. The sheriff returned on the summons: "Received 14 April, 1923; served; defendant, J. R. Mitchell, not to be found in Hertford County." *Alias* summons dated 1 May, 1923, was issued to sheriff of Mecklenburg County. The sheriff returned on the summons: "Received 12 May, 1923; served; defendant, J. R. Mitchell, not to be found in this county."

The plaintiff, before the clerk of the Superior Court of Hertford County, made the usual affidavit and prayer for service of summons on the defendant by publication, alleging the defendant was a nonresident of the State, etc.

The clerk made the usual order of service by publication, "requiring the defendant to appear before the clerk of the Superior Court of Hertford, at his office in Winton, N. C., on 21 June, 1923, at the courthouse in said county, and answer or demur to the complaint of plaintiff, or the relief therein demanded will be granted."

On 21 June the defendant, through his counsel, entered a special appearance and made the following motion: "John E. Vann, attorney, enters a special appearance for the defendant in this action, and moves

to dismiss said action for improper service and want of jurisdiction." The clerk refused the motion and gave judgment for plaintiff for the amount set forth in the complaint. The defendant excepted and appealed to the Superior Court in term. The motion was renewed there, and the court below overruled the judgment of the clerk and dismissed the action for want of proper service of summons and want of jurisdiction. From this judgment plaintiff excepted and assigned error, and appealed to this Court.

This action raises the question of a judgment *in personam* and judgment *in rem.*

Notwithstanding the just and meritorious action of plaintiff, we do not think the suit on the judgment against the defendant, who, the record shows, is a nonresident of the State, obtained in 1913, can be maintained, unless there is actual personal service of summons on the defendant, or acceptance of summons by him or his authorized agent or attorney, or general appearance. The courts of this State have no extra territorial jurisdiction over a person.

If the defendant has property in this State, it would be subject to attachment for the debt, if not barred by the statute of limitations. The statute of limitations as to persons out of the State is as follows:

"If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State; and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment." C. S., 411.

It is said by *Hoke, J.,* in *Johnson v. Whilden,* 166 N. C., 109: "It is now the well-established principle that no valid judgment *in personam* can be obtained against a nonresident or other for an ordinary money demand except on personal service of process within the territorial jurisdiction of the court, or unless there has been proper acceptance of service or a general appearance, actual or constructive, by which the party submits his cause to the court's jurisdiction. The position is modified, or, rather, a different rule obtains, where, in such an action, duly instituted and on attachment issued, there has been a valid levy of property of defendant in the jurisdiction, bringing the same within the custody of the court, in which case the question of indebtedness may be considered and determined in so far only as the value of the property may be made available in satisfaction of the claim by sale under final process or further decree in the cause; beyond this value, no judgment *in per-*

sonam may be entered or enforced. *Pennoyer v. Neff,* 95 U. S., 714, and 9 Rose's Notes thereon, pp. 338-39, *et seq.; Warlick v. Reynolds,* 151 N. C., 606; *Bernhardt v. Brown,* 118 N. C., 701." *Long v. Insurance Co.,* 114 N. C., 466; *Vick v. Flournoy,* 147 N. C., 209; *Everitt v. Austin,* 169 N. C., 622; *Mitchell v. Talley,* 182 N. C., 688; *Johnson v. Whilden,* 171 N. C., 157.

We do not think the case of *White v. White,* 179 N. C., 599, applicable to the case at bar. That was a suit for divorce and alimony by a wife against her husband, who had abandoned her. The absconding husband left real estate in this State. The Court said: "As said in *Bernhardt v. Brown,* 118 N. C., 705, 'Publication is authorized in those cases in which the court already has jurisdiction of the *res,* as to enforce some lien or a partition of property in its control, or the like, and the judgment has no personal force, not even for the costs, being limited to acting upon the property.' It is further said (p. 706): 'In proceedings under this class—proceedings *in rem*—it is not necessary, as in proceedings *quasi in rem,* to acquire jurisdiction by actual seizure or attachment of the property, but it may be done by the mere bringing of the suit in which the claim is sought to be enforced, which in law (in such cases) is equivalent to a seizure, being the open and public exercise of the dominion over it for the purpose of the suit.' "

We think the ruling of the court below was in accordance with law. The judgment must be, on that account,

Affirmed.

AGGIE ALLEN ET ALS. v. J. D. PARKER.

(Filed 12 March, 1924.)

1. Wills—Descent and Distribution—Statutes—Estates—Remainders—Tenancy by the Curtesy—Vested Interests.

A devise of land to testator's two daughters for life, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest: *Held,* upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. Canons of Descent, Rule 12.

2. Same—Husband and Wife—Tenancy in Common—Survivorship—Jus Accrescendi.

Upon the death of a minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grandfather's will, without brother or sister or issue of such, the inheritance is cast under Rule 6 of the Canons of Descent before the amendment

of 1915, upon the father, if living, the amendment having the effect of making the father and mother tenants in common, with the right of survivorship. *Semble*, under the amendment the devise of these lands of the wife vests her interest in the husband.

CIVIL ACTION, to determine the title to an interest in real estate, tried on case agreed before *Daniels, J.*, at Fall Term, 1923, of JOHNSTON.

There was judgment for defendant, and plaintiffs excepted and appealed. Judgment signed by consent out of term, 10 November, 1923.

J. Faison Thomson and S. S. Holt for plaintiffs.
G. A. Martin for defendant.

HOKE, J. It appears that P. T. Massey, the former owner, died in Johnston County on 10 April, 1900, leaving a last will and testament, in which he disposed of one-half of a tract of land known as as the Polly Watson place to his two daughters, Flonnie Massey, later married to defendant, and Aggie Massey, for life, remainder to their children, etc. The facts more directly pertinent to the issue being stated in the case agreed, as follows:

"2. That item 9 of this will is as follows: 'I give and devise to my daughters, Flonnie Massey and Aggie Massey, for and during the term of their natural lives, my one-half interest in the 676 acres of land known as the Polly Watson place, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest.'

"3. That the said Flonnie Massey and the defendant, J. D. Parker, were married on 26 April, 1900, and that a son was born of said marriage on 12 December, 1901, and died on 13 December, 1901, without issue; and that no other child was born to Flonnie Massey (Flonnie Parker).

"4. That Flonnie Massey (Flonnie Massey Parker) died on 1 November, 1918, leaving a last will and testament, which was probated and recorded in the office of the clerk of the Superior Court of Johnston County, which, after certain specific devises, which devises do not affect the property described in 'item 9' of the will, made a general devise of all her property to the defendant.

"5. That Aggie Allen is a sister of Flonnie Massey (Flonnie Parker), deceased, and is a daughter of P. T. Massey; that Laura Grantham, Ada Culbreth, Patrick T. Barnes, Henry Barnes, are children of a deceased sister of Flonnie Massey (Flonnie Parker), and are grandchildren of P. T. Massey, deceased; that Joe Barnes, Mary Barnes, and Laura Barnes are great-nieces and nephews of Flonnie Massey (Flonnie Parker), deceased, and are great-grandchildren of P. T. Massey, de-

ceased; that at the time of the death of Flonnie Massey (Flonnie Parker), on 1 November, 1918, the plaintiffs mentioned in this paragraph were the only heirs at law of Flonnie Massey (Flonnie Parker)."

On these facts we are of opinion that the court below has correctly ruled that defendant is the owner of the one-fourth interest in controversy. Upon the birth of a living child of defendant and his former wife, Flonnie (*née* Massey), such child became seized of a vested remainder in the land, to the extent of one-half of one-half of same, to wit, one-fourth. Taking by purchase under the will of his grandfather, P. T. Massey, this child was thereby constituted a new *propositus,* and, under rule 6 and rule 12, our Canons of Descent, as then written (1st Revisal 1905, chapter 30), having died "without issue capable of inheriting, or brother or sister, or issue of such," the father became sole heir of the interest. Rule 12 provides that "every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized if he may have had any right, title or interest in the inheritance." And the latter clause of rule 6, as it existed at the time of this descent, was as follows: *"Provided,* that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, if living, and if not, then in the mother." The infant child of defendant and his wife, Flonnie, having so died, the father, under this statute, became the owner of this remainder as heir to his child."

Since that time, on 29 January, 1915, rule 6 has been amended so as to carry such an inheritance to the father and mother as tenants in common, if both are living, and if only one of them is living, then to the survivor. Chapter 9, Laws 1915, and now appearing in C. S., ch. 29.

The interest having vested by descent prior to the enactment of this latter statute, the father takes the entire interest; and if it were otherwise, the facts show that Flonnie Parker has devised all of her property to defendant. The decided cases on the subject are in full support of his Honor's ruling. *Early v. Early,* 134 N. C., 269; *Britton v. Miller,* 63 N. C., 270; *Chambers v. Payne,* 59 N. C., 277; *Mason v. White,* 53 N. C., 421; *Sanderlin v. Deford,* 47 N. C., 75; *Vanhook v. Vanhook,* 21 N. C., 589.

In *Latham v. Lumber Co.,* 139 N. C., 9, to which we were cited by plaintiff, the children took but a contingent remainder, dependent upon their being alive at the death of the life tenant, but no such provision appears in the present will; the infant child, as stated, having become seized of a vested interest at his birth.

Affirmed.

MARTHA ROYAL ET ALS. v. W. H. MOORE, EXR. OF FESTUS ROYAL.

(Filed 12 March, 1924.)

1. Wills—Interpretation—Intent—Several Items — Estates — Residuary Clauses.

An estate in item 1 of a will to testator's mother and sisters and brothers as residuary legatees in equal shares, his heirs at law, and in item 2 to his heirs that may be living at the time of his death: *Held*, these two items will be construed together to effectuate the testator's intent, which is not to enlarge the number of the heirs specified in item 1, or to let in his grandchildren, being the children of such of the testator's children as were dead at the time of his death.

2. Same—Insurance—Election of Benefits.

Where the testator has included the proceeds from his life insurance policies in the residuary clause of his will, such of his children who are named beneficiaries under the policies who elect to take as such beneficiaries cannot take under the residuary clause wherein they are named with the testator's other children to take an equal part.

APPEAL by defendants from *Cranmer, J.*, at September Term, 1923, of SAMPSON.

This case calls for construction of the following items of the will of Festus Royal:

"1. I give, devise and bequeath, after my bills have been settled, to my sister, Fannie Faison, to have $400, Sadie Royal to have $250, and Hattie Marable to have $100.

"The following, to wit:

"My sister, Anna Warren, $250.

"My mother, Martha Royal; sister, Senia Herring; Neal Royal, brother; Janie Weeks, sister; and Luther Royal, each to share equally and alike of whatever remains, as provided by this will.

"2. I hereby devise and bequeath unto such of my heirs as may be living at the time of my death an equal share of whatever remains of my belongings, of whatever nature and kind soever and wheresoever the same shall be at the time of my death, to be divided among them, that they share and share alike. Of all my insurance, such as my large endowment policies from each of my fraternal orders, of whatever nature and kind, to be divided so as to form an equal part of the beneficiaries in my policies with the other heirs."

The testator, Festus Royal, was the son of Martha Royal, and at the time of making his will, and also at his death, she was living. He also had four living sisters, namely: Anna Warren, Fannie Faison, Jane Weeks, and Senia Herring, and two brothers, Neal Royal and Luther Royal. Two of his sisters, Catherine Royal Faison and Sarah Royal

King, were dead at the time of making the will. The court held that the true and proper construction of the will was:

1. That the specific legatees named in the will are entitled to receive the amounts bequeathed them, as follows: Fannie Faison, $400; Sadie Royal, $250; Hattie Marable, $100; and Anna Warren, $250.

2. That the balance of the estate devised and bequeathed shall go in equal shares to the residuary legatees, Martha Royal, Senia Herring, Neal Royal, Jane Weeks, and Luther Royal.

3. That Anna Warren and Martha Royal, beneficiaries under the fraternal policies mentioned, are required to hotchpot the proceeds of said policies before they are entitled to share as legatees under said will.

And it further appearing to the court that the legatees, Fannie Faison, Sadie Royal, and Hattie Marable, have each been paid the amount of their specific legacies; and it further appearing that Anna Warren, beneficiary under policy of $300, and Martha Royal, beneficiary under policy of $300, have each received and collected the amount of said policies; and the court being of opinion that they are required to put the amounts of insurance back into the estate before they are permitted to receive anything under the will:

It is thereupon considered and adjudged that the said Anna Warren and Martha Royal shall take nothing under the will, having elected in open court to hold the proceeds of said insurance policies.

All specific legatees having been satisfied, it is therefore further considered and adjudged that the residue of the estate, subject to legal charges of administration, be divided equally between Senia Herring, Neal Royal, Jane Weeks, and Luther Royal, subject to accounting on final settlement for any advances already made to them by the executor.

The defendant executor appealed.

A. McL. Graham for plaintiffs.
H. E. Faison and Manning & Manning for defendants.

CLARK, C. J. The appellee contends that item 2 is in reality part of item 1 and was added after item 1, not for the purpose of enlarging the number of heirs so as to include all of the testator's heirs as residuary legatees, but to limit the legacies theretofore given unto "such of my heirs as may be living at the time of my death"; thus plainly showing an intention to limit the testator's bounty immediately to such of his brothers and sisters named as residuary legatees as might be living at the time of the testator's death. The death of any such residuary legatee prior to the death of the testator would have placed the children of such residuary legatee in the exact position in which the children of Catherine Faison and Sarah King now find themselves.

We think that this is the proper construction, and that, considering the first and second items of the will together as one paragraph, we have a plain, connected, unambiguous testamentary disposition of all the property owned by the testator; and that the second clause of the will, thus construed, is simply a restatement of the first clause, and makes clearer and more definite the residuary clause, which should read as if written, "I hereby devise and bequeath unto *such of my heirs as may be living at the time of my death an equal share of whatever remain of my belongings.*"

The contention of the defendant that the children of the deceased sisters are included as beneficiaries under the residuary clause would make that clause not an auxiliary construction of the residuary clause, but a repeal of it. If the testator had intended that the children of his deceased sisters should share, he would have said so, and would not have left such intention to be inserted by the strained construction contended for by the defendants. If the children of the deceased Catherine Faison and Sarah King are to take under section 2 of the residuary clause, they must take with the named beneficiaries, "share and share alike"—that is, *per capita* and not *per stirpes;* and to accept this construction would have the effect of giving to the five children of Sarah Royal King five times as much of the *residuum* as the specially named beneficiaries under the will receive. This is not a reasonable construction, and we think that the judgment of his Honor was correct.

The court properly held that the insurance policies were part of the *residuum;* and Anna Warren and Martha Royal having elected to take as beneficiaries under said policies, and not under the will, and the pecuniary legacies having been paid to the parties named, the residue was properly directed to be divided between Senia Herring, Neal Royal, Jane Weeks, and Luther Royal.

Affirmed.

IN RE WILL OF MRS. EMMA HARDEE.

(Filed 12 March, 1924.)

1. Instructions—Trials.

The charge of the court should be construed as a whole, so that all that relates to any phase thereof may be contextually considered, so as to place it in its proper setting; and while an exception to a part thereof, standing alone, may be subject to just exception, it is not ground for error if the charge, properly construed with other relative parts, states the law applicable to the evidence.

2. Same—Expression of Opinion—Statutes.

Where there is evidence of fraud and undue influence in the making of a will being caveated, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage to a man who had no property, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge, contrary to the statute. C. S., 564.

APPEAL by propounder from *Daniels, J.,* at June Term, 1923, of VANCE.

Issue of *devisavit vel non,* raised by a caveat to the will of Mrs. Emma Hardee. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

From a verdict and judgment in favor of caveators the propounder appeals, assigning error.

Jere P. Zollicoffer, Perry & Kittrell, Kittrell & Kittrell, and A. A. Bunn for caveators.

R. S. McCoin, D. G. Brummitt, and Royster & Royster for propounder.

STACY, J. There was ample evidence to support the verdict, and the record presents but a single serious exception, or one not involving settled principles of law. Propounder assigns as error the following portion of the charge:

"The exclusion of some of the children from the benefits of the paper, and giving of the whole estate to one child in the absence of some reasonable ground for such preference, would constitute what the law calls an unnatural will, and such facts may be considered with the other evidence in the case, as evidence upon the questions of mental capacity and of undue influence."

The vice of this instruction, according to propounder's contention, is that it undertakes to characterize the paper-writing, offered for probate, as an unnatural will, when no such will is known to the law; and it is further objected that said characterization amounted to an unfavorable expression of opinion from the court. C. S., 564. We are unable to agree with propounder's interpretation in its entirety, or to conclude that this instruction, taken in connection with other portions of the charge, should be held for reversible error, even if slightly objectionable, standing alone. It is now settled law that the charge of the court must

be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained, and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge should be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties.

In the first place, it should be observed that his Honor says the giving of the whole estate to one child, to the exclusion of other children, "in the absence of some reasonable ground for such preference," would constitute what the law calls an unnatural will (but he did not say this was an unnatural will), and such fact "may be considered, with the other evidence in the case, as evidence upon the question of mental capacity and undue influence." See *In re Burns' Will,* 121 N. C., 338; *In re Worth's Will,* 129 N. C., 228, and *In re Mueller's Will,* 170 N. C., 30. In a previous portion of the charge, the jury had been instructed upon this point as follows: "If you are satisfied that she made an unreasonable disposition, but are not satisfied that she was lacking in testamentary capacity, or that she was unduly influenced, that cannot affect you in any way. You would disregard the question of reasonableness or unreasonableness, because, as I have already said, she had a right to make any disposition she saw fit, if she had capacity and was not unduly influenced."

The facts were that Mrs. Hardee first married William Fox, from whom she acquired all of her property. Five children were born to this union. She later married D. W. Hardee, a man without means, and to this union one child was born. The testatrix left her entire estate to her second husband and to their only son, the propounder herein, excluding the caveators, who are the children of the testatrix by her former marriage. There was ample evidence tending to show undue influence and mental incapacity.

The record presents no reversible error, and the judgment entered below will be upheld.

No error.

B. D. JOHNSON v. J. F. MURPHY, RICHARD GRAHAM, WILLIAM E. MURPHY, WILLIAM DIXON, LEWIS CARR, AND E. T. JOHNSON.

(Filed 12 March, 1924.)

Appeal and Error—Dormant Judgments—Revival—Executions—Insufficient Findings—Case Remanded.

Where the appeal calls for the determination of the equities between the several defendants and the plaintiff involved in proceedings to revive a dormant judgment by the issuance of execution, wherein it is claimed that a settlement made by the plaintiff with a defendant released them all, the appeal will be remanded, to be proceeded with in the Superior Court, when the findings of fact by the trial judge upon which he granted the issuance of the execution are insufficient for the Supreme Court to satisfactorily pass upon the rights of the parties.

APPEAL by plaintiff from *Grady, J.,* at August Term, 1923, of DUPLIN.

On 14 April, 1917, in a justice's court, the plaintiff recovered against the defendants three judgments, which were docketed in the Superior Court on 16 April, 1917.

The judgments became dormant, and upon affidavit filed by the plaintiff the clerk issued to the defendants a notice to show cause why execution should not issue. Certain of the defendants filed an answer, and alleged:

1. That the plaintiff had purchased from the defendant Murphy a tract of land on which the judgments were a lien, and caused the deed to be made to the plaintiff's brother, E. M. Johnson.

2. That the plaintiff joined in the execution of the deed for the purpose of releasing the land from the lien of the judgments.

3. That Murphy paid the plaintiff only $450 for the land, and received a receipt from the plaintiff for $50 in full payment and satisfaction of all demands.

The defendants contend that they are released from the lien of the judgments, and that execution should not be issued.

The case was transferred to the Superior Court, and the following findings of fact were made:

1. After the judgments had been docketed, the defendant J. F. Murphy sold to E. M. Johnson a tract of land worth $500, and in order to clear the land of the judgment liens the plaintiff joined in the deed with Murphy, and caused a recital to be placed in said deed that he joined therein for the sole purpose of releasing the land from the lien of his judgment. The defendant Murphy paid plaintiff the sum of $50 out of the proceeds of said sale, and this amount was credited on the first judgment. The other defendants knew nothing of this transaction.

2. Nothing else has been paid on said judgments, and this motion was made to revive the same. All of the defendants answer and ask that the equities between the parties be declared and judgment entered.

His Honor thereupon rendered judgment as follows:

Ordered and adjudged that execution issue upon said judgments, and the same are hereby revived and declared to be in full force, subject to the credit of $50 which has been credited thereon.

It is further ordered and adjudged that upon payment by each of the other defendants of the sum of $50 on said judgments, then each of them shall be entitled to have $500 worth of property released from the lien of said judgments, over and above his homestead and personal property exemptions; and with the foregoing modifications said judgments are declared to be in full force and effect.

George R. Ward for plaintiff.
Oscar B. Turner for defendants.

PER CURIAM. The facts set out in the judgment are not sufficient to enable us satisfactorily to adjust the rights of the parties. It does not appear whether all the defendants are principals or whether the release of Murphy's land from the lien of judgment will necessarily result in loss to any of the other defendants or in any way adversely affect the extent of their liability. Nor is there any finding as to whether the plaintiff accepted $50 in full payment of all demands against Murphy, as alleged in the affidavit filed before the clerk.

The judgment is reversed and the cause remanded to the end that a full and complete statement of all relevants be found and judgment rendered thereon.

Reversed and remanded.

CHARLES F. DUNN v. A. W. TAYLOR, SHERIFF.

(Filed 12 March, 1924.)

Judgments—Motions to Set Aside—Term—Appeal and Error.

A judge is without authority to set aside a judgment final by default of an answer, rendered in term, after he has adjourned the court to expire by limitation and has left the county, though without notice given of its final adjournment; and in this case, upon the plaintiff's exception to an order thus made, *it is held* the plaintiff's exception is sustained without prejudice to the rights of the defendant to assail the judgment at a subsequent term of court, by motion in the cause or other appropriate remedy.

BANK *v.* DUKE.

APPEAL by plaintiff from *Grady, J.,* at December Term, 1923, of LENOIR.

Civil action to require the defendant, as sheriff of Lenoir County, to execute and deliver to plaintiff a tax deed for certain lands, bid off by plaintiff at a tax sale, and for which he holds certificate, duly issued by the defendant.

At the December Special Criminal Term, 1923, judgment by default was entered on motion of plaintiff and upon the showing that no answer had been filed by the defendant. Two days after the adjournment of said court in Kinston, and before the end of the week, the judge signed an order at his home in Clinton, N. C., directing that the judgment by default rendered in this cause be stricken out and canceled of record. From this order the plaintiff appeals.

Chas. F. Dunn in propria persona.
John G. Dawson and F. E. Wallace for defendant.

STACY, J. The December Term of court ended in Kinston when the judge left the bench for the term, although no notice was given of the final adjournment, and it was understood that the term of court should expire by limitation. *Delafield v. Const. Co.,* 115 N. C., 21; *Branch v. Walker,* 92 N. C., 87. His Honor, therefore, was without authority to enter the order, signed at his home in Clinton, canceling or vacating the judgment previously rendered by him at term. The plaintiff's exception to this order must be sustained; but this will be done without prejudice to the rights of the defendant to assail the judgment rendered at the December term, or to have it vacated by motion in the cause or other appropriate remedy.

Error.

FARMERS AND MERCHANTS BANK v. OTHO H. DUKE, ADMINISTRATOR OF H. J. DUKE.

(Filed 12 March, 1924.)

1. Judgments—Motions to Set Aside—Excusable Neglect—Defenses—Statutes.

In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the court can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. C. S., 600.

2. Same—Appeal and Error—Findings of Fact.

Upon appeal from the refusal of the Superior Court judge to set aside a judgment for excusable neglect, the facts as found by him upon which he has acted are ordinarily conclusive, and his rulings of law only are reviewable.

3. Same—Insanity.

A judgment obtained against one who was *non compos mentis* is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. C. S., 600.

4. Same.

Upon passing upon defendant's motion to set aside a judgment for excusable neglect, upon the ground of his intestate's insanity, it appeared that he was represented on the trial by his counsel, and his depositions read in evidence, and that his friends and relations appeared thereat, and his defense to the action was vigorously made: *Held*, not reversible error for the judge to refuse to pass upon the defendant's insanity at the time of the trial. The statutory provisions protecting the estate of one *non compos mentis*, C. S., 451, 406, commented upon by *Clarkson, J.*

APPEAL by defendant from *Kerr, J.*, on motion to set aside judgment at October Term, 1923, of VANCE.

Civil action. We think the facts material for the decision of this case are set forth in the judgment of the court below, which is as follows:

"Now comes O. H. Duke, as administrator of the estate of H. J. Duke, and moves that judgment for the plaintiff in the above-stated action be set aside for the reason that at the time of the trial of said action the defendant was *non compos mentis* and was not represented by a guardian *ad litem*, and offered twelve affidavits to this effect; and that at the time the judgment therein was signed the judge presiding had left the district and his term had expired; and further, that O. H. Duke, the administrator, be made a party defendant in the above action.

"After hearing allegations and evidence of both parties the court finds the following facts:

"1. That the above cause was tried at the October Term of Vance County, 1922.

"2. That at said trial the defendant H. J. Duke was represented by his counsel, Messrs. Hicks & Son and J. G. Mills, the attorneys now making the above-mentioned motion in behalf of O. H. Duke. That O. H. Duke is a son of defendant H. J. Duke, who was present at the trial, together with sons, sons-in-law, neighbors and friends of the defendant H. J. Duke.

"3. As a basis for using the deposition of H. J. Duke in the evidence, the certificate of the family physician of H. J. Duke, bearing date of the trial of this cause, together with the evidence of Otho Duke,

the son of the defendant, stating that he had seen his father. 'I last saw him (my father) this morning at 6 o'clock. He was down in bed, disable to get out, and has been so since 15 June. He is not able to get up at all without help.' Together with the evidence of T. E. Holden: 'We would accept his checks through our bank. Even knowing his condition, I would cash his checks today.'

"4. The deposition of H. J. Duke was offered in evidence by counsel for H. J. Duke, defendant; admitted by the court, and argued by counsel for defendant.

"5. No question of the insanity of the defendant H. J. Duke at the time of the trial was then raised or suggested.

"6. Upon issue submitted by the court, as shown on the record, the jury found that the defendant H. J. Duke had sufficient mental capacity to execute the notes at the time of their execution, and that the plaintiff, the Farmers and Merchants Bank, was the innocent holder of said notes in due course.

"6½. On motion of J. G. Mills, attorney for H. J. Duke, it was agreed by counsel for plaintiff and defendant that judgment might be signed out of term and out of the district, *nunc pro tunc.*

"7. The judgment was signed by Hon. J. Loyd Horton by consent of counsel out of the district and out of term on 2 January, 1923, as of October Term, 1922.

"8. H. J. Duke was adjudged insane on 29 November, 1922.

"9. Counsel for the defendant gave notice of appeal to the Supreme Court and filed a record of the case without raising any question of his insanity.

"10. On 16 January, 1923, the defendant H. J. Duke signed appeal bond in this cause, together with his son, Otho Duke, which bond was submitted to the clerk of the Superior Court of Vance County as a valid bond and accepted in good faith.

"The appeal of the defendant H. J. Duke was dismissed by the Supreme Court in February, 1923.

"Upon the foregoing findings the court declined to pass on the question of the sanity of H. J. Duke at the time of the verdict and judgment, and doth decline the motion of defendant to set aside the verdict and judgment."

Defendant Otho H. Duke, administrator, excepted to the foregoing findings of fact and judgment, also to the refusal of the court to sign the judgment tendered by defendant, and appealed to this Court, and made the following assignments of error:

"No. 1 is to the refusal of the judge to decide or pass upon the motion of defendant administrator to set aside the verdict and judgment on the ground that the defendant H. J. Duke was insane when the same was rendered.

"No. 2 is to the finding of facts in the judgment signed, defendant contending that they were not based upon any proper evidence, and that in view of the judge's refusal to pass upon the question of the defendant's sanity, they were irrelevant, immaterial and prejudicial to the defendant.

"No. 3 is to the refusal of the judge to sign the judgment tendered by defendant as based upon his ruling, though not being the judgment which the defendant deemed himself entitled to."

Perry & Kittrell, Andrew J. Harris, and Kittrell & Kittrell for plaintiff.

J. G. Mills and T. T. Hicks & Son for defendant.

CLARKSON, J. The assignments of error raise but one main contention that at the time of the trial of the action the defendant's intestate, H. J. Duke, was *non compos mentis* and was not represented by a guardian *ad litem.* H. J. Duke has died since the verdict and judgment, and the defendant, Otho H. Duke, has been appointed his administrator. The defendant administrator made a motion in the cause in the court below to set aside the judgment. The motion is based on C. S., 600, which is as follows:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

It is well settled in this State that the application should show not only mistake, inadvertence, surprise or excusable neglect, but *also a meritorious defense. Land Co. v. Wooten,* 177 N. C., 250, and cases cited; 23 Cyc., 962, 1031.

In the instant case a final judgment is asked to be set aside. If this judgment is set aside, the same evidence will be heard on a new trial, and the issues as heretofore found against defendant's intestate submitted again to a jury. It will be "threshing over old straw." There is nothing in the record to indicate that there is any newly discovered evidence material to the cause that might change the present verdict and judgment. There is a presumption that a judgment in a court of competent jurisdiction is regular and valid.

Allen, J., in *Crumpler v. Hines,* 174 N. C., 284, says: "One who asks to be relieved from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party. If he is a

plaintiff, he must allege facts constituting a cause of action, and if a defendant, facts which will be a defense. It is not required that these facts be established conclusively on the hearing of the motion, but they must be alleged in good faith, and must, if true, in the one case show a cause of action, and in the other a defense. In other words, the facts alleged must make a *prima facie* cause of action or defense, the ultimate and final determination of these being left to the proper tribunal, if the judgment is set aside. *Mauney v. Gidney,* 88 N. C., 202; *English v. English,* 87 N. C., 497; *Norton v. McLaurin,* 125 N. C., 189; *Turner v. Machine Co.,* 133 N. C., 381; *Minton v. Hughes,* 158 N. C., 586."

Clark, J., in *Norton v. McLaurin, supra,* says: "This is a motion to set aside a judgment for excusable neglect under The Code, sec. 274. The findings of fact by the judge are final (*Weil v. Woodard,* 104 N. C., 94; *Albertson v. Terry,* 108 N. C., 75; *Sykes v. Weatherly,* 110 N. C., 131), unless upon an exception that there was no evidence as to some fact found by him (*Marion v. Tilley,* 119 N. C., 473), or failure to find material facts (*Smith v. Hahn,* 80 N. C., 241)." See *Hardware Co. v. Buhmann,* 159 N. C., 512; *Mann v. Hall,* 163 N. C., 51; *S. v. Jackson,* 183 N. C., 698.

It is the duty of the court below to find the facts, and his finding is ordinarily conclusive. Upon the facts found, the conclusion of law only is reviewable.

The court in the judgment distinctly says, "After hearing allegations and evidence of both parties, the court finds the following facts." Among the many facts found is "No question of the insanity of the defendant H. J. Duke at the time of the trial was then raised or suggested."

At the trial the deposition of H. J. Duke was read; he was represented by counsel; his son, the present administrator, was present; his other sons, sons-in-law, neighbors and friends were present.

The court below, after finding the facts set out in the record, "declined to pass on the question of the sanity of H. J. Duke at the time of the verdict and judgment, and doth decline the motion of defendant to set aside the verdict and judgment."

From the findings of fact by the court below, in law, did he commit error in refusing to pass on the sanity of H. J. Duke and in refusing to set aside the verdict and judgment? We think not. If a verdict is rendered and judgment obtained against a person *non compos mentis,* without a guardian *ad litem,* it is not void but voidable. So, conceding that this was a voidable judgment, should it be set aside for excusable neglect? Under the facts, we think not. H. J. Duke's sons, sons-in-law, neighbors and friends were all present. His counsel were present. No suggestion was made to the judge holding court or to the attorneys

for plaintiff that the defendant's intestate was *non compos mentis.* The trial was regular in all respects. The plaintiffs won, and now this motion is made to set aside the verdict and judgment and a request to the court below to go into the sanity of H. J. Duke at the time of the verdict and judgment. The due and orderly administration of justice under the facts found by the court below would be hampered if the judgment was set aside.

We think the true position is set forth in Buswell on Insanity, sec. 131, as follows: "Unsoundness of mind of a defendant, existing to such an extent as to render him incapable of transacting or understanding business, is sufficient cause to justify the setting aside his default or appearance in a civil suit. But it seems that, in civil as well as in criminal proceedings, the insanity of a party at the time of trial is not a ground for granting a new trial upon his restoration to sanity, *unless it is made to appear to the court that a new result would probably be reached if a new trial were granted, and that, by reason of the party's incapacity, injustice was done him on the former trial.*" (Italics ours.)

We do not think the case of *Craddock v. Brinkley,* 177 N. C., 124, is contra to the position taken in this case. In that case it was said: "The jury find that plaintiff was insane and confined in an asylum at the time the former action was instituted, and also at the time the consent judgment was entered, and that the twenty acres in controversy are her property." In that case the plaintiff was a married woman.

In *Stigers v. Brent,* 50 Md., 214 (33 Am. Rep., 319), it is said:

"The naked point is presented whether a lunatic can be sued at law for a debt which he contracted when of sound mind, and a judgment therefor obtained against him. Upon this point all the authorities agree, unless where some statute intervenes to prohibit it. In this State no such statute exists. . . . The text-books are also agreed upon the point. In Freeman on Judgments, 123, sec. 152, it is said: 'While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by judicial proceedings, in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable; they cannot be reversed for error on account of defendant's lunacy. . . . In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian.' See, also, Shelford on Lunatics, pp. (m) 407 and 429, and 3 Robinson's Practice, p. 240, par. 3, and English authorities there cited."

We do not go as far as the *Stigers' case, supra.* Our State, in its humanity towards those whom "the finger of God has touched," has passed the following statutes:

C. S. 451. "In all actions and special proceedings, when any of the defendants are infants, idiots, lunatics, or persons *non compos mentis,* whether residents or nonresidents of this State, they must defend by their general or testamentary guardian, if they have one within this State; and if they have no general or testamentary guardian in the State, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian *ad litem,* to defend in behalf of such infants, idiots, lunatics, or persons *non compos mentis.* The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person *non compos mentis,* defendants."

C. S., 406. "On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense."

The above section (406) gives the court discretion at any time before the action is finally disposed of to order or bring in by proper notice one or more of the *near relatives or friends of the insane person,* and may make such other order as it deems necessary for a proper defense.

In the original trial of the case, H. J. Duke's attorneys, sons, sons-in-law, neighbors and friends were all present.

Without doing so *seriatim,* we have discussed the positions taken by defendant in the assignments of error.

From the facts and circumstances of this case we think the court below correct in its judgment.

Affirmed.

L. TAYLOR ET AL. v. H. F. LEE ET AL.

(Filed 12 March, 1924.)

Statute of Frauds—Promise to Answer for Debt of Another—Evidence—Motions—Nonsuit—Questions for Jury.

It does not require a writing within the statute of frauds to answer for the debt, default, or miscarriage of another (C. S., 987), where the promissor directly assumes the debt or has a pecuniary interest therein; and where a landlord has obtained supplies to be furnished to his tenant within the coming crop year, upon his promise to see that the tenant pay for them, it is sufficient to deny the promissor's motion to nonsuit in an action against him by the furnisher of the supplies to recover for their payment.

APPEAL by defendant, H. F. Lee, from *Grady, J.*, at September Term, 1923, of DUPLIN.

Civil action tried upon the following issues:

"1. Did the defendant H. F. Lee promise and agree to become bound to the plaintiffs for supplies furnished to B. D. Parker during the year 1920, as alleged in the complaint? A. Yes.

"2. If so, in what amount is the defendant Lee indebted to the plaintiffs by reason of said contract? A. $1,552.60 and interest.

"3. In what amount is the defendant Parker indebted to the plaintiffs for supplies furnished him during the year 1920? A. $1,552.60 and interest."

From a judgment of $1,552.60, rendered jointly and severally against the two defendants, the defendant H. F. Lee appeals.

Langston, Allen & Taylor and R. D. Johnson for plaintiffs.
Stevens, Beasley & Stevens for defendant.

STACY, J. Appellant's chief exception, as stressed on the argument and in his brief, is the one addressed to the refusal of the court to grant his motion for judgment as of nonsuit, made first at the close of plaintiffs' evidence and renewed at the close of all the evidence, and based upon the ground that appellant's special promise to plaintiff, which was not in writing, was to answer for the debt, default or miscarriage of his codefendant Parker, and was therefore void under the statute of frauds. C. S., 987.

It was in evidence that the defendants, Lee and Parker, landlord and tenant respectively, went to the plaintiffs' store and made arrangements with them whereby the plaintiffs were to furnish the defendant Parker with certain supplies during the year 1920. Plaintiffs understood that Lee was to be responsible for whatever Parker bought. He said to

the plaintiffs: "Mr. Parker will be on our land this year and you sell him anything he wants and I will see it paid." Almost this identical language was held in *Whitehurst v. Padgett,* 157 N. C., 424, to be sufficient to warrant a finding that the promise was an original one and not within the statute of frauds, if made at the time or before the debt was created, upon sufficient consideration, and credit was given thereon solely to the promissor or to both promissors as principals, or if the promise were based upon a new consideration of benefit or harm passing between the promissor and the creditor, or if the promise were for the benefit of the promissor and he had a personal, immediate and pecuniary interest in the transaction in which a third party was the original obligor. See *Peele v. Powell,* 156 N. C., 553, and cases there cited.

In the instant case there was no exception to the charge, and we think the case was properly submitted to the jury. The verdict as rendered was warranted by the evidence.

No error.

Z. Z. GRANTHAM v. R. A. NUNN, TRUSTEE, C. K. TAYLOR, MRS. MARY M. BRYAN, AND T. M. HOLTON.

(Filed 12 March, 1924.)

1. Equity—Mortgages—Subrogation.

A stranger to a mortgage who has paid off the mortgage debt under an agreement with the mortgagee that he is to be substituted to the rights of the latter, is not a mere volunteer who will be denied the equitable right of conventional subrogation to the rights of the mortgage creditor, and he is entitled to be subrogated to the mortgagee's rights, and to enforce the mortgage against subsequent parties in interest.

2. Same—Assumption of Mortgage Debt.

One who purchases from the mortgagor his equity of redemption under an agreement that he will assume and pay the mortgage debt, becomes personally liable for the debt he has thus assumed.

3. Same—Registration—Notice.

A purchaser at the foreclosure sale under a second mortgage takes with implied notice of the indebtedness secured by the prior registered mortgage, and where one or several of the notes therein secured has been paid by one who is entitled to subrogation to the first mortgagee's rights, and none of the parties in interest have appealed from a judgment in the purchaser's suit denying this right, there is no equity existing in appellant's favor, the other parties being presumed to have acquiesced therein, and the judgment will not be disturbed.

4. Same—Subrogation Pro Tanto.

Where a mortgage on lands secures several notes maturing at different dates, and one or several of them have been paid by a stranger under agreement with the mortgagee whereunder he is entitled to subrogation *pro tanto* to his rights, the purchaser at foreclosure sale under a second mortgage, claiming only under the mortgagor's equity, cannot successfully rely upon the equitable principle that the subrogation will not apply unless the other notes secured by the first mortgage has been paid in full.

APPEAL by plaintiff from *Daniels, J.*, at January Term, 1924, of CRAVEN.

Application for mandatory injunction to compel the cancellation of a deed of trust upon the following facts:

1. Judge Henry R. Bryan and wife, Mrs. Mary N. Bryan, and Shepard C. Bryan, trustee, conveyed the tract of land described in the complaint to L. T. Grantham on 8 April, 1918.

2. L. T. Grantham executed his purchase-money deed of trust to R. A. Nunn, trustee, for $5,900, securing 11 notes of $500 each and one note of $400, payable on 1 March, in the years 1919 and 1929, both inclusive.

3. L. T. Grantham conveyed the land to Charles K. Taylor on 4 December, 1918, and as a part of the purchase price Charles K. Taylor assumed the payment of the notes made to Mrs. Mary N. Bryan, wife of Judge Henry R. Bryan, and agreed to pay the same upon their maturity, and executed a second deed of trust securing $6,545.50, payable to L. T. Grantham.

4. Mrs. Mary N. Bryan transferred the first three notes of said L. T. Grantham to Shepard C. Bryan, Esq., by endorsement.

5. L. T. Grantham transferred the notes of Charles K. Taylor, aggregating $6,545.50, to Dr. Earl S. Sloan.

6. Charles K. Taylor paid the first $500 note payable to Mrs. Mary N. Bryan and by her transferred to Shepard C. Bryan, and by him sent to the National Bank of New Bern for collection on 15 March, 1919; and the second of said notes endorsed by the said Mrs. Mary N. Bryan to the said Shepard C. Bryan, and by him sent to the National Bank of New Bern for collection on 15 March, 1920.

7. On 15 March, 1919, Chas. K. Taylor had on deposit in the New Bern Banking and Trust Company $743.19, and on the 17th day of that month an item of $500 was debited against the said account.

8. On 15 March, 1920, Chas. K. Taylor had on deposit in the New Bern Banking and Trust Company $1,492.82, and on the 17th day of that month his account was debited with $530-odd dollars.

9. T. W. Holton loaned to Chas. K. Taylor on 15 March, 1919, the sum of $500 in cash with which to pay the first note of the series herein first above mentioned; that said loan was made at the express request and solicitation of the said Chas. K. Taylor and of the said L. T. Grantham, original maker of these notes.

10. On 15 March, 1920, T. W. Holton loaned to Chas. K. Taylor $530-odd dollars with which to pay the second note of the said series then matured, and such loan was made at the express request of the said Charles K. Taylor and the said L. T. Grantham, the original maker of the notes.

11. The said two notes were paid by Chas. K. Taylor on 15 March, 1919 and 1920, respectively, to the National Bank of New Bern, said notes being in form and being endorsed as appears from the exhibit attached to the complaint.

12. After said notes were paid the endorsement thereon appearing, to wit, "Paid by T. W. Holton, Chas. K. Taylor; witness, C. R. Ryman," was made for the purpose of transferring said notes to the said T. W. Holton to secure him for the amount of the money loaned.

13. The second deed of trust hereinbefore named, made by Taylor to secure the purchase-money to Grantham over and above the amount due Mrs. Mary N. Bryan, was foreclosed under the power of sale and the lands bought by Z. Z. Grantham, and by him conveyed as follows: A part to one Baker with a second mortgage to Dr. Earl S. Sloan on the remainder of the land, in lieu of the $6,545.50 of notes of L. T. Grantham, secured by his two mortgages which Dr. Earl S. Sloan had held.

14. T. W. Holton had no interest in the land on 15 March, 1919, or on 15 March, 1920, but made the advancements or loans as a volunteer at the instance of Chas. K. Taylor and L. T. Grantham; and that such advancements have never been repaid to the said T. W. Holton, and that the said T. W. Holton is holding the above-named notes as per copy attached to the complaint.

15. The said T. W. Holton notified the trustee, R. A. Nunn, of his having paid the notes and of his holding the notes with the consent of said Grantham, and by the request of the said Taylor requested the said trustee, R. A. Nunn, to sell the said land or, failing to sell the said land, to figure out the interest and principal, so that he might take up the indebtedness, which he agreed to do.

16. A part of the original tract of land covered by this deed of trust has been sold by Z. Z. Grantham; Grantham never demanded of the said Holton the two said notes, but did offer to trade the said Holton land for the same; since the maturity of the two said notes the trustee,

R. A. Nunn, has had knowledge of all this transaction between the parties; but neither the said trustee, Mrs. Mary N. Bryan, Shepard C. Bryan, the National Bank, D. S. Sloan, nor Baker consented to the transfer or the taking up of the note by Holton; R. A. Nunn, trustee, is the agent and attorney for the said Mrs. Mary N. Bryan.

His Honor gave judgment denying the relief demanded, and the plaintiff appealed.

Guion & Guion for plaintiff.
H. P. Whitehurst and T. D. Warren for T. W. Holton, appellee.

ADAMS, J. While the plaintiff seeks by mandatory injunction to compel the cancellation of the deed of trust to R. A. Nunn upon payment of all the notes made to Mrs. Bryan, except the two that were sent to the National Bank of New Bern, the defendant Holton, as we understand, demands either a sale of the land for the payment of the two notes held by him or an opportunity by taking up the remaining notes to be subrogated to the rights of Mrs. Bryan. It will be noted, therefore, that the controversy presents the question whether Holton is entitled to subrogation *pro tanto,* that is, to the amount of the notes which he claims to have paid.

Primarily subrogation, or substitution, is a doctrine of equitable jurisprudence. It is a change by which another person is put into the place of a creditor so that the creditor's rights and securities pass to him, or a legal fiction by force of which an obligation extinguished by the payment of a third party is treated as still subsisting for his benefit, on the ground that such party is entitled to the rights of the creditor whom he succeeds. Subrogation is either legal or conventional, the former arising by operation of law and the latter depending upon a lawful contract. Conventional subrogation occurs where one who has no interest in the subject-matter pays the debt of another, and by agreement becomes entitled to the rights and the securities of the creditor. If a mere stranger or volunteer pay the debt of another without any assignment or agreement for subrogation, when he is neither under legal obligation to make the payment nor under compulsion to do so for the preservation of his rights or property, he is not entitled to subrogation; but a different principle prevails if a person advance money to pay a mortgage debt under an agreement with the owner of the equity that he shall hold the mortgage as security for his advance. In the latter case if the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and

to enforce the mortgage. Sheldon's Law of Subrogation, secs. 1, 2, 19, 240; Story's Eq. Juris. (13 ed.), secs. 493 and note and 500; Bispham on Equity, 454.

In *Publishing Co. v. Barber,* 165 N. C., 478, 486, the doctrine is expressly approved, *Mr. Justice Walker* saying: "It has been held that though a mere volunteer cannot, by paying off a mortgage, acquire an equitable lien or any right of subrogation, yet if he advances the money to redeem or pay off a mortgage at the request of one who is interested or bound to discharge it, he may be protected against such person by subrogation." And in *Bank v. Bank,* 158 N. C., 239, 244, it is said: "The authorities are entirely agreed that where a person advances money to pay off a mortgage debt under an agreement with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage." It is also held that an agreement by the purchaser of an equity of redemption with his vendor that he will assume and pay the mortgage debt will render him personally liable. *Kennedy v. Trust Co.,* 180 N. C., 225; *Caldwell v. Robinson,* 179 N. C., 518, 524; *Brown v. Harding,* 171 N. C., 686, 691; *Perry v. Adams,* 98 N. C., 167; *Springs v. Harven,* 56 N. C., 96; *Scott v. Dunn,* 21 N. C., 425 *Williams v. Williams,* 17 N. C., 69; *Oil Co. v. Cotton Co.,* 46 L. R. A. (N. S.), 1049; 27 A. & E., 247; 27 R. C. L., 1339, sec. 23.

It is, no doubt, in recognition of these principles that the plaintiff concedes Holton's right to subrogation as against Taylor; but, conceding this, he contends that Holton has no such right as against Mrs. Bryan or any other person holding notes secured by Taylor's mortgage or Grantham's deed of trust.

In considering this proposition we must remember that L. T. Grantham, Sloan, and Baker are not parties to the action, and that the plaintiff is the only party who excepts to his Honor's ruling. Holton asks that it be sustained; and, in the absence of an exception, we may assume that neither of the other defendants cares to have the judgment disturbed, and if this be true, we may adjust the controversy by determining the relative and respective rights of the parties chiefly interested in the result. This indicates, of course, that we are primarily concerned with the rights of the plaintiff; for if he is not prejudiced by the judgment, he has no valid reason for assailing it, and we are at a loss to know how he may be prejudiced unless he has acquired rights which a court of equity ought to protect. Has he acquired such rights? He succeeded to Taylor's title in the land by a mortgagee's deed, executed

3 March, 1923. About three years before this deed was made, Holton, at the request of Taylor and L. T. Grantham, paid the second of the two $500 notes, on each of which were written the words "Paid by T. W. Holton," in order to transfer the notes and secure the amount he had advanced. Taylor was bound by this agreement; the plaintiff acquired Taylor's title after Holton had received the two notes; the deed of trust securing the notes delivered to Mrs. Bryan was duly registered, and the plaintiff, after making his purchase, recognized the validity of the two notes in question by offering to convey to Holton a tract of land in payment. So the plaintiff, a subsequent party in interest, held the land, in like manner with Taylor, subject to Holton's equities. Particularly has he no ground of complaint, in view of the fact that the registered deed of trust was constructive notice of the entire indebtedness thereby secured. *Bank v. Bank, supra,* 251.

The plaintiff insists, however, that Holton, upon his own showing, holds only two of the notes executed to Mrs. Bryan, and that, as the remaining notes are outstanding, Holton is not entitled to subrogation *pro tanto.* It is true, as a general rule, that a person is not entitled to be subrogated to the creditor's securities unless the debt has been paid in full. The reason is, that if a surety who has made a partial payment is subrogated *pro tanto,* he will occupy a position of equality with the holder of the unpaid part of the debt; and if the property be insufficient to pay the remainder of the debt for which the surety is bound, the loss will fall proportionately upon the creditor and the surety. But this doctrine, it is said, has in every instance been invoked for the protection of the creditor, and never to defeat contract obligations in the interest of the debtor alone. *Shinkle v. Huffman,* 71 N. W. (Neb.), 1004. When the right of subrogation is the result of an express agreement, a partial payment may effect a *pro tanto* subrogation of the creditor's securities, particularly when the indebtedness is payable in installments and the evidences of the debt are notes maturing at different dates. 25 R. C. L., 13, 18, sec. 6; *Am. Bonding Co. v. Bank,* 99 A. S. R., 483, note; 27 A. & E. (2 ed.), 205; 6 Am. Cas., 205, note. The mortgagors agreed that Holton should hold his two notes as security, and if a similar agreement is necessary on the part of Mrs. Bryan, her acquiescence in his Honor's judgment is tantamount to consent. *Loeb v. Fleming,* 15 Ill. App., 503; *Strickman v. Roose,* 46 N. E., 680.

Finding no error, we affirm the judgment.

Affirmed.

STATE v. LAFAYETTE McALLISTER.

(Filed 12 March, 1924.)

1. Intoxicating Liquor—Spirituous Liquor—Statutes—Possession—Instructions.

Chapter 1, section 2, Laws 1923, known as the Turlington Act, was expressly to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises; and an instruction to find the defendant guilty under these circumstances, if proved beyond a reasonable doubt, is not erroneous.

2. Same—Verdicts.

A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited under the provisions of the Turlington Act, ch. 1, secs. 2 and 10, Laws 1923.

3. Same—Appeal and Error—Instructions—Harmless Error.

Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, contrary to the provisions of the Turlington Act, an erroneous charge as to receiving and transporting it, is harmless error.

APPEAL by defendant from *Bond, J.*, and a jury, at January Term, 1924, of WASHINGTON.

Criminal action. The defendant was arrested on 21 November, 1923, under warrant charging that he unlawfully and wilfully did have in his possession and did receive, transport spirituous liquor, contrary to the statutes, etc. The defendant was tried in the Recorder's Court of Washington County, and from the verdict of "guilty," and judgment thereon, the defendant appealed to the Superior Court.

The defendant was tried in the Superior Court of Washington County, January Term, 1924, upon the original warrant. The State introduced P. W. Brown as a witness, who testified that on a certain occasion, since the "Turlington Act" has been in force and effect, he saw some colored men, the defendant being one of them, on the river shore in the town of Plymouth, not on the premises of either of them, and in watching them he saw one of the other men pass a bottle of liquor to the defendant, who

took a drink out of the bottle and handed the bottle back to the man who had passed it to him. There was other evidence offered. The State rested its case.

The defendant introduced no evidence, but made a motion, at the close of the State's evidence, to nonsuit, which was refused, and defendant excepted.

The court charged the jury that, if they believed the evidence and found the facts to be as it tended to prove, and beyond a reasonable doubt therefrom, that the prisoner took the bottle and passed the bottle back to the owner, it would be their duty to return a verdict of "guilty of unlawfully receiving whiskey."

The defendant excepted to the charge. There was a verdict of guilty, and a defendant was sentenced by the court to pay a fine of $5 and costs of action.

The defendant assigned as error the refusal of the court below to nonsuit, the charge given, and the judgment rendered, and appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

P. H. Bell for defendant.

CLARKSON, J. Chapter 1, section 2, Laws 1923 (known as the "Turlington Act"), is as follows: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor, except as authorized in this act; and all the provisions of this act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of 'The Volstead Act,' act of Congress enacted 28 October, 1919, an act supplemental to the National Prohibition Act, 'H. R. 7294,' an act of Congress, approved 23 November, 1921."

The provision of the above act is taken from act of Congress (U. S. Compiled Statutes, 1923, 10138½aa), which is as follows: "No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor, except as authorized in this act, and all the provisions of this act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and pos-

sessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided,* that nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses, and no special-tax liability shall attach to the business of purchasing and selling such warehouse receipts. (28 October, 1919, ch. 85, Title II, sec. 3, 41 Stat., 308.)" It will be noted that the word "purchase" was added to section 2 of the Turlington Act, *supra.* 10138½ C., *supra,* makes it unlawful, under the Volstead Act, under certain circumstances, to "purchase" intoxicating liquors for beverage purposes.

Fed. Stat. Anno., 1921 (2 ed.), Supp., p. 540, is as follows: "Purpose as preventing use of liquors for beverage purposes.—The chief purpose of the framers of the Volstead Act was to reduce and as far as possible to prevent the use of intoxicating liquors as a beverage. *U. S. v. Turner* (W. D. Va., 1920), 266 Fed., 248; *U. S. v. Masters* (M. D. Pa., 1920), 267 Fed., 581; *Street v. Lincoln Safe Deposit Co.* (S. D. N. Y., 1920), 267 Fed., 706; *Ledbetter v. Bailey* (W. D. N. C., 1921), 274 Fed., 375; *Kelly v. Lewellyn* (W. D. Pa., 1921), 274 Fed., 108.

" 'If anything is well settled and determined, it is that the Volstead Law, enacted pursuant to, and in consequence of, the adoption of the Eighteenth Amendment to the Federal Constitution, was intended and calculated by Congress and by those interested in its passage, to prohibit the manufacture, sale, and transportation, for beverage purposes, of any and every kind of intoxicating liquor within the United States; and Congress expressly defined such "intoxicating liquor" to be any spirituous, vinous, malt, or fermented liquor or liquid "fit for use for beverage purposes" containing alcohol to the extent of "one-half of one per cent, or more," by volume. Volstead Law, Tit. II, sec. 1. So that, by this law, which was enacted after much consideration of the circumstances and of the obvious intent and purpose of the people of the United States, as reflected by their ratification of the amendment, it was definitely and positively determined that any liquor or liquid, fit for use as a beverage and possessing alcohol in excess of the maximum mentioned, might not be manufactured, sold, or transported in the United States. Even its mere possession was similarly prohibited, save under exceptional, severely necessary, and obviously harmless circumstances.'

" 'This conclusion results not only from the reading of the act in its entirety, looking at the big purpose in view, and the means to be employed to gain the end sought, but also from the language of section 3 of Title II, the controlling section of the act, which is to the effect that:

" 'No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufac-

ture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor, except as authorized in this act, and all the provisions of this act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented.'

" 'Here, in unequivocal language, we have a declaration on the part of Congress that, however this act may be viewed, and tested by every means known to those whose duty and function it is to construe statutes, in every instance the statute "shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented." Nothing can be plainer than that, and it seems to me that Congress, there, as it might properly do, has said that the courts shall not seek to construe the statute so as to permit the use of intoxicating liquors as a beverage, but that they shall use all reasonable means to construe it so as to prevent such use.' *U. S. v. Dodson* (S. D. Cal., 1920), 268 Fed., 297.

"The primary object of the Prohibition Act is the prevention of the use of intoxicating liquors as a beverage, although it retains features of a revenue law. To effectuate that purpose, the statute requires that all of the provisions shall be liberally construed. *U. S. v. Sacein Rouhana Farhat* (S. D. Ohio, 1920), 269 Fed., 33.

" 'It is apparent from the provisions of this act that intoxicating liquor may be imported for nonbeverage purposes. It is likewise manifest that the provisions of this act shall not in any way interfere with the operation of existing law, except where it is inconsistent, and the act expressly provides that persons shall not be relieved from any taxes or other charges imposed upon the traffic in such liquor.' *The Goodhope* (W. D. Wash., 1920), 268 Fed., 694.' "

The charge on which defendant was tried "did have in his possession and did receive, transport spirituous liquor contrary to the statutes" (1) possess, (2) receive, (3) transport.

There was a general verdict of guilty. The statute clearly does not allow one to transport or possess intoxicating liquor.

Section 2 of the Turlington Act (chapter 1, Public Laws 1923, *supra*) makes the possession of any quantity of intoxicating liquor for beverage purposes unlawful, unless, of course, the possession of the liquor is in one's private dwelling, under section 10. It is true that there is nothing in the act which makes the actual receipt of intoxicating liquors, independent of the fact that one cannot possess liquor without having received it at some time, a criminal offense. Here, however, the warrant charges unlawful possession, the unlawful receipt, and the unlawful transportation of liquor. The verdict of the jury was general upon this warrant. It can then be sustained upon the charge of unlawful possession. The fact that the judge's charge may have been erroneous in the

particular in which he told the jury if they believed the evidence beyond a reasonable doubt, to return a verdict of guilty of unlawfully receiving liquor, would render it harmless error, in the face of the fact that there was a proper charge on the warrant and a proper verdict upon proper evidence.

In *State v. Switzer, ante,* 96, it was said: "There was a general verdict of guilty, which, in law, was a verdict of guilty on each and every count. The general verdict of guilty upon two counts will be sustained if the evidence justifies either. *S. v. Toole,* 106 N. C., 736; *S. v. Strange,* 183 N. C., 775." *S. v. Coleman,* 178 N. C., 760.

In the case of *S. v. Jackson,* 13 N. C., 563 (decided nearly one hundred years ago), *Judge Ruffin* said: "In ordinary cases the consequence would be a new trial. But in the present the statute is spread out in the case, and it is thus made to appear to us that the jury have precisely adopted that interpretation, which the court ought to have given by way of instruction. The course of the judge gave the prisoner the benefit of the chance of a mistake of the jury. He cannot complain that they made no mistake. As, therefore, it is manifest that the jury have administered the law correctly, there is no ground for a new trial.

In *Cunard S. S. Co. v. Mellon,* 262 U. S., 100; 43 Sup. Ct. Repr., 506, *Mr. Justice Van Devanter* says: "Some of the contentions ascribe a technical meaning to the words 'transportation' and 'importation.' We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another, nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance, for his own purposes, it is transportation, no less than when a public carrier, at the instance of a consignor, carries and delivers to a consignee for a stipulated charge. See *United States v. Simpson,* 252 U. S., 465; 40 Sup. Ct., 364; 64 L. Ed., 665; 10 A. L. R., 510. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in, it is importation, regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act."

It is well said by *Clark, C. J.,* in the concurring opinion in *S. v. Coleman,* 178 N. C., 762: "The intention of the act may be tersely expressed in the phrase, 'Taste not, touch not, handle not' the forbidden article (for beverage purposes). It is outlawed by the statute, just as dynamite or any poisonous drug, and for the same reason that the popular will has deemed this necessary for the public welfare, and made the violation of that will a crime."

From a careful examination of the authorities we can find

No error.

JESSIE JINKINS v. STEPHEN CARRAWAY, TRUSTEE OF EXCELSIOR HOUSEHOLD OF RUTH, No. 4224, ET ALS.

(Filed 12 March, 1924.)

Courts—Jurisdiction—Unincorporated Associations—Mandamus.

The courts have no jurisdiction over the management of an unincorporated association, or order, by *mandamus*, wherein there has been no violation of criminal law, or where the deprivation of property rights is not in question.

APPEAL by defendants from *Grady, J.*, at chambers in Kinston, December, 1923.

This is a proceeding begun by a motion for an alternative *mandamus* for reinstatement as a member in Ruth Lodge, No. 4224. The defendants demurred *ore tenus* for lack of jurisdiction. The demurrer was overruled.

Defendants Stephen Carraway, Sarah Brown, and Bertha Moore are the trustees of Excelsior Household of Ruth, No. 4224, an unincorporated fraternal organization, located at Kinston, N. C., and the other defendants are the councilor and secretary of said lodge.

At a meeting of said lodge in June, 1922, a charge was preferred against the plaintiff for violation of a rule or by-law, in that she had called another member "a liar" in open lodge; and after due trial in said lodge the plaintiff was ordered to pay a fine of $10. She appealed to the District Household of Ruth, No. 10, which had appellate jurisdiction. On appeal, judgment was rendered by the appellate lodge "That Sister Jessie Jinkins pay a fine of $3 and go before the Household and beg pardon. If she refuses, then she stands expelled until she does." After said decision the plaintiff elected to pay the fine of $3 which the said Excelsior Household refused to receive, and the plaintiff alleges that she also tendered the lodge the amount of her dues which the lodge refused to receive, and thereupon the plaintiff instituted this proceeding asking for an alternative writ of *mandamus* to compel the lodge to readmit the plaintiff to full and complete membership in Excelsior Household of Ruth, No. 4224.

The answer admits that the plaintiff had finally tendered the $3 and she offered to apologize to the District Household, but she had refused to "apologize to them niggers in the subordinate household," and that she has never paid anything and still owes her dues. In the court on the hearing among the evidence put in was the following minutes of the lodge:

"Wednesday, afternoon session at 2 o'clock p. m. Sister Sadie F. Fagan, district grand most noble governor, sounded the gavel; quarterly

pass taken, all correct; roll of officers called; all present; invocation by district worthy prelate, Sister Victoria Lofton; music, 'Blest be the Tie That Binds.' Meeting declared open for business; committee on D. G. M. N. G.'s address being ready, came forward and submitted its report through its secretary, Sister Alice E. Riddick. . . .

"We, your committee on trial, beg leave to make our report, as following: Sister Jinkins was present to answer charge. We decided according to law 34, on page 37, and section 10, that Sister Jinkins shall pay a fine of three dollars ($3.00) and go before the H. H. R. and beg pardon. And if she fails within thirty days from date she shall pay a fine of $10 and it be added to her dues. Signed: Bertha Moore, Mollie Jones, Carrie Brown, E. E. Brown.

"The above decision was adopted by the H. H. R., 4224, and committee, 2 June, 1922. Signed: M. K. Holloway, W. R."

Upon hearing the case, Grady, J., rendered judgment "that the defendants accept the sum of $3 and that upon tender of an apology to said subordinate lodge, No. 4224, that she be reinstated as a full-pledged member of said subordinate lodge, No. 4224," and taxed the plaintiff with the cost. Defendants appealed.

Sutton & Green and Shaw & Jones for plaintiff.
Rouse & Rouse and Moore and Croom for defendants.

CLARK, C. J. It appears in this hotly-contested case, in which each side is represented by four counsel, that the defendant Household of Ruth, No. 4224, to which the plaintiff seeks from the courts *mandamus* to be readmitted as a member, which the court granted upon condition that she pay a fine of $3 and go before the Household and apologize, is an unincorporated association. It also appears that it is an association of colored members, and apparently from the names in the record consisting mostly of women, singularly enough in an order styled "Odd Fellows."

This Court will exercise its duty of administering justice irrespective of the size and nature of the wrong complained of, provided it has jurisdiction; but in this matter, important as doubtless it seems to the parties, the first question is the one asked in Scripture, "Who made us judges of such matters?"

We have held recently in *Tucker v. Eatough,* 186 N. C., 505, that "An unincorporated association or society has no legal entity at common law and has none conferred by statute, and that the Court will dismiss the action when there is want of jurisdiction *ex mero motu,* and that a written demurrer for want of jurisdiction cannot confer jurisdiction

upon the Court." This ruling has been affirmed since in *Citizens Co. v. Typographical Union, ante,* 42. Without minimizing the importance which the parties and their counsel attach to this proceeding, they must be left to settle it in their own manner, for the courts are entirely without jurisdiction to consider the case.

It has been often held in other jurisdictions also that there is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant. *Picks v. Walsh,* 192 Mass., 589. A voluntary association being only a collection of individuals could not at common law sue or be sued by its associated name. *Lewelling v. Woodworkers Underwriters,* 140 Ark., 128; and numerous other cases cited in 33 Yale Law Journal, 383 (February, 1924), in an article where the lack of jurisdiction by the courts over unincorporated associations is most fully discussed with an exhaustive citation of authorities on the subject.

In 18 R. C. L., p. 144, sec. 60, it is said: "Ordinarily a *mandamus* will not lie to regulate the internal affairs of unincorporated associations for, as has been said, if the writ would lie to regulate the affairs of such an association, it could with equal reason be invoked to regulate the affairs of a copartnership. . . . In this connection, membership in a voluntary association of individuals, organized without a charter, but regulated as to their action by a constitution and by-laws, is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced, and as a general rule *mandamus* cannot be maintained against such an association by a party to compel it to admit him to membership and office therein. And if expulsion from such association does not involve the loss of any property rights, *mandamus* will not lie to compel restoration though the expulsion may have been unlawful; and the broad view has been taken that *mandamus* will not lie to reinstate a person to membership though his expulsion may have been unlawful and may have injuriously affected the member's pecuniary interest," and there are many citations in the notes to sustain these statements.

However ruthless or otherwise the action of Excelsior Lodge, No. 4224, of Ruth may have been, the courts have no jurisdiction to compel it to readmit the plaintiff and require her to apologize to the subordinate lodge for her use of what the lodge held to be "unparliamentary language" in calling another member a liar. The court should, like the most noble Festus, Acts XXV, have held it *"inter alios acta,"* of which the court had no jurisdiction.

Commonwealth v. Union League, 20 Am. State Rep., 870, and notes, hold that a judgment of expulsion of a member of a social club in

good faith, and after conviction under its charter and by-laws, cannot be reëxamined by a court of justice.

Also *Doyle v. Burke,* 16 A. & E. Anno. Cas., 1245, holds that the remedy of a person who has been wrongfully expelled from membership in a voluntary unincorporated association is by an action for damages and not by *mandamus* to compel his restoration to membership. See the numerous cases cited in the notes thereto.

S. v. Cook, 32 A. & E. Anno. Cas., 89, and notes thereto, hold that the writ of *mandamus* does not lie to regulate the affairs of unincorporated societies or associations.

In *Hatfield v. Cummins,* 36 L. R. A. (N. S.), 945, and the voluminous notes thereto, it was held that a *mandamus* will not lie to compel members of an unincorporated religious society to restore a member expelled therefrom, where the right violated is merely one of the religious association or worship.

Where the act complained of is a deprivation of property rights or a violation of criminal law, the courts will take cognizance not by a *mandamus* nor to regulate the proceedings of the unincorporated association among themselves, but to enforce the general law of the State. For instance, in *S. v. Williams,* 75 N. C., 134, it was held that "the rules of discipline for all voluntary associations must conform to the laws; hence when a member of such an association refuses to submit to the ceremony of expulsion established by the same, which ceremony involved a battery, it cannot be lawfully inflicted." In that case a woman member had been suspended from the wall by a cord fastened around her waist, with other ceremonies according to the rites of the "Good Samaritans" had been inflicted, not viciously but as part of the rite of expulsion under its by-laws. The Court held that this was an assault and battery and cognizable by the courts.

In this case, whether the language used was unparliamentary and whether, on the imposition of the fine of $3 and the judgment that she should apologize to subordinate lodge, her refusal to "apologize to them niggers in the subordinate household" could be punished by expulsion was purely a matter of internal regulation by the society involving no property rights nor violation of the criminal law. The court, therefore, had no jurisdiction.

Action dismissed.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION, A CORPORATION, v. L. C. POLLOCK, BILL LOFTIN, FURNEY GREEN, ALLEN BROWN, RALPH HADDOCK, JOSEPH BROWN, SENUS HILL, CHARLEY BROWN, LEON PARKER, AND LEE PERKINS.

(Filed 19 March, 1924.)

1. Injunction—Equity—Co-operative Marketing Association—Contracts—Breach.

In a suit by a coöperative tobacco association, formed under the provisions of Public Laws 1921, ch. 87, seeking injunctive relief against its member for disposing of his tobacco elsewhere than through the plaintiff corporation, in violation of his contract, authorized by the statute, and in collusion with his codefendant, a tobacco warehouse association, in fraud of the plaintiff's contractual rights, an answer of the defendant member, admitting that he had so disposed of his tobacco, and seeking rescission of his contract upon allegation of the plaintiff's fraud and mismanagement and failure to make the returns upon sales of tobacco it had theretofore handled for the member defendant, etc., raises an issue vitally affecting the business of the plaintiff, an adverse decision being likely to work an irreparable injury, and the temporary restraining order theretofore granted should, upon sufficient evidence, be continued to the hearing.

2. Same—Remedy at Law—Liquidated Damages.

The fact that the coöperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law for its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purposes for which it was incorporated under the provisions of the statute (chapter 87, Public Laws 1921).

THESE two cases were consolidated, and the plaintiff appealed from a judgment of *Horton, J.*, vacating a restraining order at Fall Term, 1923, of JONES.

The plaintiff, a corporation organized under Public Laws 1921, ch. 87, alleged that plaintiff and defendants had mutually executed a marketing agreement by the terms of which the defendants had agreed to sell and deliver to plaintiff all the tobacco produced by or acquired by them as landlords or lessors during the years 1922, 23, 24, 25 and 26; that they had produced and acquired a quantity of tobacco grown in 1923 and had sold a large part of it to persons other than the plaintiff, and had determined to deliver no more to it, and that the plaintiff is entitled to recover at the rate of five cents a pound for the tobacco so disposed of as liquidated damages.

The plaintiff further alleged that the Farmers Warehouse Corporation was conducting a warehouse in Kinston and was engaged in the business of selling tobacco at auction for a commission; that for the purpose of destroying the plaintiff's business the defendant corpora-

tion had conspired with the other defendants, and had induced them to violate their marketing agreement and to agree to sell their tobacco to said corporation, with knowledge that the individual defendants were members of the plaintiff association, and that the defendant corporation at the time of the acts complained of was not, and is not now, the *bona fide* owner of the tobacco produced by the individual defendants.

The defendants in the first suit admitted they had signed a paper-writing, but alleged that its execution was induced by fraud in that (*a*) the plaintiff had falsely represented that it should not be effective until 60 per cent of the tobacco growers in Virginia, North Carolina, and South Carolina had signed an identical contract; (*b*) that if the defendants signed such contract they should be paid 50 to 60 per cent of the market value of their tobacco at the time it was delivered and the remainder within a reasonable time; (*c*) that for the tobacco delivered a certificate should be issued which could be used as a security for loans, and (*d*) that the expenses incident to the operation of the plaintiff's business should be economical and that the defendants should get a better price than the open market offered.

These defendants further alleged that they had not received more than one-half the value of the tobacco delivered to the plaintiff in 1922 and could get no satisfactory information as to when another payment would be made, and that in 1923 they delivered to the plaintiff a quantity of tobacco for which they had received not more than 33⅓ per cent of its market value. They alleged that the plaintiff's disregard of its obligation entitled them to a rescission of their contract, and for this reason they had determined to make no further delivery to the plaintiff and to litigate the question of their right to make sale to the warehouse.

The Warehouse Corporation filed an answer denying the material allegations of the complaint, especially that it had entered into a conspiracy with the other defendants, and alleged that it had purchased certain tobacco from the defendants in good faith.

His Honor vacated the temporary restraining orders and required the defendants to execute a bond in the sum of $2,000 to indemnify the plaintiff as provided by the statute, and the plaintiff excepted and appealed.

Burgess & Joyner and Duffy & Day for the plaintiff, appellant.
Aaron Sapiro, E. L. Hayes and T. E. Bowen of counsel for plaintiff.
John G. Dawson and T. D. Warren for Pollock et al., appellees.
Cowper, Whitaker & Allen for the Warehouse Corporation.

ADAMS, J. The only question for consideration is whether the restraining order should have been continued to the final hearing, and the rule by which the question is to be determined has often been stated. As now accepted and enforced, the rule is said to have been formulated upon the distinction between common and special injunctions, the former of which were issued in suits brought to restrain an action at law or to enjoin the collection of a judgment recovered in a court of law, and were usually dissolved upon a full denial of the equity set up in the bill. However, the change of procedure by which legal and equitable demands may now be tried in the same court and all equitable defenses made in the original action led *Mr. Justice Rodman* to remark, "It is difficult to conceive how a case for common injunction can ever arise." *Jarman v. Saunders,* 64 N. C., 367. As to special injunctions it is otherwise. In *Cobb v. Clegg,* 137 N. C., 153, *Mr. Justice Walker* said: "In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in *statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor, in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." It will be observed that the relief demanded in the present case is an injunction pending the action against the sale or other disposition of tobacco in breach of the standard agreement, to the end that the plaintiff may enforce specific performance of the contract. *Purnell v. Daniel,* 43 N. C., 9; *Heileg v. Stokes,* 63 N. C., 612; *Jarman v. Saunders, supra; Tobacco Co. v. McElwee,* 94 N. C., 425; *Tise v. Whitaker,* 144 N. C., 508; *Stancill v. Joyner,* 159 N. C., 617; *Sanders v. Ins. Co.,* 183 N. C., 66.

The marketing agreement contains these provisions: "(*a*) Inasmuch as the remedy at law would be inadequate, and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the association should the grower fail so to sell and deliver all of his tobacco, the grower hereby agrees to pay

to the association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts. (*b*) The grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of tobacco the association shall be entitled to an injunction to prevent breach or further breach thereof, and to a decree for specified [specific] performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions, and that the buyer cannot go to the open markets and buy tobacco and replace any which the grower may fail to deliver."

The defendants contend not only that they were fraudulently induced to execute the agreement but that the plaintiff has failed to comply with its contract, and that they may therefore insist upon rescission and sell their tobacco without incurring liability to the plaintiff. With respect to these contentions, the pleadings raise issues of fact concerning which the Court expresses no opinion; but the plaintiff sets up an unlawful collusion or conspiracy of the defendants to defeat its rights under the agreement and in effect an attempt to destroy its business. The individual defendants admit their purpose to deliver no more tobacco to the plaintiff and to refer their legal rights to adjudication. All the defendants are therefore brought directly within the principle established in *Tobacco Assn. v. Patterson, ante,* 252; *Tobacco Assn. v. Battle, ante,* 260; *Tobacco Assn. v. Spikes, ante,* 367, in reference to which *Mr. Justice Hoke* said: "In those cases defendants had denied their membership and were in an attitude of resistance towards the contract and any and all of its obligations, and in such case, in our opinion, the writ was required to conserve and protect the rights of the plaintiff pending litigation." *Tobacco Assn. v. Bland, ante,* 356.

The defendants contend that the judgment should be affirmed because the damages are liquidated by the terms of the contract and therefore not irreparable, and that the plaintiff has an adequate remedy at law; but if this argument be approved it may be invoked by all members of the association who, after signing the standard contract, see fit to sell their tobacco on the open market—a condition which would probably result in the destruction of the association or the disintegration of its business. The very purpose of the organization is to stabilize the price of tobacco by promoting coöperation in selling, and its purpose would be defeated by granting to the members immunity from all liability beyond the payment of liquidated damages. In *Coöp. Assn.*

v. Jones, 185 N. C., 265, the *Chief Justice* observed: "Damages, of course, are of no real value. The association must have crops to market or it will go out of business; therefore relief in equity is provided, and it is an essential point in this case."

During the argument here the defendants filed an affidavit to the effect that after the dissolution of the restraining order the crop of 1923 had been sold by the defendant corporation, and that none of it was then in the hands of either of the defendants. The affidavit does not appear in the record and is no part of the case on appeal. Besides it is not, in our opinion, a full and sufficient disclosure of all the facts and circumstances relating to the alleged sale, particularly when considered in connection with the allegations contained in the tenth, eleventh, and twelfth paragraphs of the answer filed by the individual defendants. Whether the tobacco may be restored we cannot determine, but the plaintiff contends that all the crop of 1923 has not been disposed of and seeks to enjoin the disposition in breach of the contract of any crop hereafter to be produced. However this may be as to the present crop, even if we should consider the affidavit made by the president of the defendant corporation as a part of the record, we think the principle controlling upon this question is clearly given by the Court in *S. v. Scott,* 182 N. C., 865, 882: "It is argued that this case is like that where the tree was cut down, after the restraining order against felling it had been vacated. *Harrison v. Bryan,* 148 N. C., 315, and these additional cases are cited, supposedly to the same effect. *Pickler v. Board of Education,* 149 N. C., 221; *Wallace v. Wilkesboro,* 151 N. C., 614; *Moore v. Monument Co.,* 166 N. C., 211. But they do not apply to this case, as the facts are not the same. In *Harrison v. Bryan, supra,* the tree had fallen under the stroke of the axe, never to rise again. It could not grow again after it had been destroyed. It had died and was therefore beyond restoration. This was a fact established, and not even a mandatory injunction could change it. But here the act of the defendants may be repeated, it at least is possible for them to do so, and the plaintiffs are not bound by their declared intention not to repeat their mistake. The law will strip them of the power to do so by its restraining process."

The order of his Honor dissolving the restraining order is reversed and the injunction is continued to the final hearing.

Reversed.

ROBERT H. WARNER ET ALS. AND THE CAROLINA HARDWARE COMPANY v. R. H. HALYBURTON AND FRANK COOPER, PARTNERS, TRADING AS CAROLINA CONSTRUCTION COMPANY, AND T. F. BOYD AND THE BOARD OF EDUCATION OF WAKE COUNTY.

(Filed 19 March, 1924.)

1. **Liens — Contracts — Principal and Surety — Material Furnishers — Statutes—Education.**

   A contract for the erection of a public-school building, made with the county board of education, does not expressly or impliedly provide for the payment of claims of material furnishers by the obligation of the contractor to furnish the materials therefor at his own expense, without more; and a surety on the bond for the contractor's faithful performance of his contract is not liable to the material furnishers, either under the contract or under the provisions of C. S., 2445, requiring the school authorities to take a bond with surety from the contractor before commencing the building, and giving materialmen, etc., a right of action thereon.

2. **Same.**

   C. S., 2445, before its amendments by chapter 100, Public Laws 1923, requiring, among other things, a county board of education to take a bond with surety for the performance, etc., by the contractor under his contract to erect a public-school building, imposes a new duty on them in this respect, and provides for its enforcement by indictment of the individual members of the board, and no civil liability to the material furnishers, etc., attaches to the board, as such, for a failure to require a sufficient bond for the purpose.

CIVIL ACTION, heard and determined on case agreed, before *Grady, J.*, at February Term, 1924, of WAKE.

From the facts as stated, it appears that in 1922 the Carolina Construction Company contracted with the Board of Education of Wake County to build for the obligee, county of Wake, a public schoolhouse at Apex, N. C., for the contract price of $58,083, payable in specified installments, and to provide, at "their own expense, all labor, material, scaffolding, etc., necessary for the proper performance," etc. And there were various other provisions in the contract looking for the protection of the board of education, one of the contracting parties; that later the construction company entered into a bond in the sum of $15,000, signed by R. H. Halyburton, a member of the partnership, and T. F. Boyd, as surety, for the faithful performance of the contract; that the building was completed according to specifications and paid for as agreed upon; the last payment, $555, being on 6 January, 1923, and on certificate of the architect, as the contract required, and this and all other payments were made without any demand or notice of any existent claims for material or otherwise; that, pending the construction of the

schoolhouse, plaintiffs, supply men, furnished to the contractors building material to a large amount, a large portion of which was paid for, but leaving a balance due the plaintiff hardware company of $490.63 as of 4 November, 1922, and $750 due Campbell-Warner Company as of 18 June, 1922, which is still unpaid.

Upon these, the facts chiefly pertinent to the inquiry, the court entered judgment that the Board of Education of Wake County had taken a sufficient bond for protection of materialmen, as required by section 2445 of the Consolidated Statutes, and as to them the action be dismissed; that plaintiffs have judgment against defendant partnership and T. F. Boyd, surety, for $15,000 penalty of the bond, to be discharged on payment of the amounts respectively due them, and interest. Defendant T. F. Boyd excepted and appealed.

Plaintiffs also excepted and appealed, "to the extent required to preserve their rights against the Board of Education of Wake County."

Robert C. Strong for Carolina Hardware Company; N. G. Fonville and S. Brown Shepherd for Campbell-Warner Company, plaintiffs.

Gibbons & Legrand for T. F. Boyd.

J. M. Broughton for Board of Education of Wake County, defendants.

HOKE, J. Section 2445 of the Consolidated Statutes provides that every county, city, town, or other municipal corporation which lets a contract for building, repairing, or altering any building or public road or street shall require the contractor for such work (when the contract price exceeds $500) to give a bond before beginning the work, and payable to said county, city, etc., conditioned for payment of all labor done or material and supplies furnished for said work; that said bond may be put in suit by any laborer or material and supply man having a valid claim; and further, that if the official of said county, city, or town, or other municipal corporation fails to require this bond, he shall be guilty of a misdemeanor, etc.

The contract in question provides that the construction company shall build and complete the schoolhouse at Apex, N. C., providing all the materials, etc., therefor at their own expense, at the price of $58,083. There is no stipulation in the agreement that the contractor shall pay either the laborers or the materialmen, and a perusal of the instruments throughout will show that they are merely designed to secure the satisfactory and proper completion of a turnkey job, so far as the municipality is concerned, and that no interest *ultra* is provided for or contemplated. The case presented comes directly within the decisions of the Court in *McCausland v. Construction Co.*, 172 N. C., 708, and *Mfg. Co. v. Andrews*, 165 N. C., 285.

The bond signed as surety by the appellant Boyd is that the contract shall be faithfully performed, and, this contract, as stated, containing no stipulation binding his principal to pay either laborers or materialmen, in our opinion, there has been no liability established against the surety.

The claimants, appellees, cite and very largely rely on *Ingold v. Hickory,* 178 N. C., 614, but the case is not an authority for their position. In that case the bond given contained direct stipulation for the payment of laborers and supply men engaged in the work, and expressly referred to the requirements of the statute in further explanation of the true intent and meaning. The decision in *Ingold's case* dealt chiefly with and rejected a claim by the surety that under an added stipulation he could restrict his obligation contrary to the statutory provision, and, as stated, gives no support to the position of appellee as to the liability of the surety on the facts of the present record.

In so far as the liability of the board of education, as such, is concerned, this statute, as it does, imposing a new duty and providing for its enforcement by indictment, on authority this remedy, and none other, must be pursued, and no civil liability will attach to them officially. *James v. Charlotte,* 183 N. C., 630-632; *S. v. R. R.,* 145 N. C., 495-499. Whether the members as individuals may be held civilly liable to claimants is not before us, as they have not been sued in that capacity.

As to any cases of this character to arise in the future, we consider it well to note that the Legislature of 1923 (chapter 100) has amended this section (2445) of the Consolidated Statutes so as to provide that every bond given by a contractor to counties, cities, towns, or other municipal corporations shall, notwithstanding its form, be conclusively presumed to have been taken pursuant to the statute, and the provisions of such statute shall be conclusively presumed to be written in such bond. Section 2 of the amended law provides further that only one action can be brought in such cases, all claimants to be duly notified, and if the aggregate sum shall exceed the amount of the bonds, there shall be a *pro rata* payment. The surety is also allowed, by paying into court in such suit the full amount of the penalty of the bond, to be quit of any other or further liability thereon.

On appeal of plaintiffs, judgment affirmed.

On appeal of surety, judgment reversed.

THE McCABE LUMBER COMPANY v. THE BEAUFORT COUNTY LUMBER COMPANY.

(Filed 19 March, 1924.)

Verdicts—Correction—Courts.

It is within the sound legal discretion of the trial judge to permit a jury, before its discharge, at the instance of its members and without suggestion from others, to reassemble as the jury in the case, and correct an error in calculation as to damages in their verdict, so as to make it conform to the true verdict they had theretofore agreed upon. The principle upon which a jury is not allowed to attack a verdict they had previously rendered is distinguished.

APPEAL by plaintiff from *Horton, J.,* at November Term, 1923, of CRAVEN.

Civil action to recover damages for an alleged trespass and for the wrongful cutting and removal of plaintiff's timber.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Is the plaintiff the owner of the land in controversy, described in the amended complaint? Answer: Yes.

"2. Has the defendant wrongfully trespassed on said land? Answer: Yes.

"3. What damage is plaintiff entitled to recover by reason of said wrongful trespass? Answer: $10800, with interest." (Later corrected to read $1080, with interest.)

Plaintiff tendered judgment on the verdict as originally rendered, and objected to any correction or reformation of it by the jury. From the judgment rendered on the verdict as corrected the plaintiff appeals.

R. A. Nunn and Guion & Guion for plaintiff.
Moore & Dunn for defendant.

STACY, J. The single question presented by this appeal is whether the court acted without authority in permitting the jury to correct their finding after returning the verdict, and to make it speak what they had agreed and intended it should, or to reform it in accordance with what they actually found.

The material facts, briefly stated, are as follows: The jury came into the courtroom about 12 o'clock noon and rendered their verdict as above set out. The issues were given to the clerk for recording. The court then excused the jury until after the noon recess. They separated and went out for dinner. About 2 p. m., just before the reconvening of

court, several members of the jury approached the judge and stated that a mistake had been made in the verdict, and they desired to correct it. Upon the opening of court for the afternoon session, his Honor caused the jury to be reassembled in the box, and upon inquiry each and every juror stated that a mistake had been made in the answer to the third issue; that instead of being $10800 it should have been $1080. It was their finding that the plaintiff should be allowed $1 per 1,000 feet cut, but the foreman, in calculating the amount, erroneously computed it on the basis of $1 per 100 feet. Whereupon, the court, over plaintiff's objection, allowed the jury to retire with the issues and to reform the answer to the third issue in accordance with their original agreement and understanding. Plaintiff objected, and tendered judgment on the verdict as originally rendered.

There is no suggestion of any tampering with the jury, or other improper influence having been exerted over them, between the time they first rendered their verdict and when they asked to be allowed to reform it. *Petty v. Rosseau,* 94 N. C., p. 362.

It is firmly established in this State that jurors will not be allowed to attack or to overthrow their verdicts, nor will evidence from them be received for such purpose. *Baker v. Winslow,* 184 N. C., p. 9; *Purcell v. R. R.,* 119 N. C., p. 739; *Johnson v. Allen,* 100 N. C., 137; *Jones v. Parker,* 97 N. C., 33; *S. v. Royal,* 90 N. C., 755; *McDonald v. Pless,* 264 U. S., 269; 59 L. Ed., 1300. But this rule does not affect the power of the court to perfect a verdict, nor to correct any inadvertence or mistake that may have occasioned the entry of a verdict at variance with the real finding of the jury. *Cox v. R. R.,* 149 N. C., 87; *Cole v. Laws,* 104 N. C., 657; *Petty v. Rosseau, supra; Willoughby v. Threadgill,* 72 N. C., 438; *Wright v. Hemphill,* 81 N. C., 33.

The following general statement of the law, supported by the citation of a number of authorities, is taken from 27 R. C. L., 900:

"*Mistake or Clerical Error.*—The general rule that the statements of jurors will not be received to establish their own misconduct or to impeach their verdict does not prevent the reception of their evidence as to what really was the verdict agreed on, in order to prove that, through mistake or otherwise, it has not been correctly expressed, as the agreement reached by the jury, and not the written paper filed, is the verdict, and a showing that the writing is incorrect is not an impeachment of the verdict itself."

The instant case presents, not an impeachment of the jury's verdict, but a correction of it such as the law allows.

We are not inadvertent to what was said in *Mitchell v. Mitchell,* 122 N. C., 332, but the circumstances of that case were quite different from what they are here. There the verdict had become a part of the

minutes of the court. The jury had separated and were out overnight. There was no suggestion from any of them that a mistake had been made or that they wished to reform the verdict as originally returned. Here the jury, of their own volition and without suggestion from any one, have asked to be allowed to correct the error or mistake. We think his Honor has acted within his discretionary powers.

No error.

LERCH BROTHERS v. McKINNE BROTHERS.

(Filed 19 March, 1924.)

Pleadings — Statutes — Judgment—Default of Answer—Excusable Neglect—Ignorance of the Law—Motions.

Where a party is made a defendant by service of summons, together with the complaint filed in the action, he is irrebuttably fixed with notice that, under the provisions of C. S., 600, he is required to file his answer in twenty days from substitute service; and on his motion to set aside judgment rendered in default of an answer, his ignorance of the law will not excuse him, though misled by the erroneous wording of the summons in this respect.

APPEAL by plaintiff from *Calvert, J.* A former appeal is reported in 186 N. C., 244.

It appears therein that the clerk denied the plaintiff's motion for judgment by default, and this Court affirmed Judge Cranmer's order reversing the clerk. After the opinion was certified to the Superior Court of Franklin County execution was issued, and the defendants thereupon moved to set aside the judgment for excusable neglect and asked leave to file an answer. The motion was heard at chambers in Raleigh on 29 December, 1923, and Judge Calvert found as facts: (1) that the summons, which was issued on 28 December, 1922, commanded the defendants to appear before the clerk of the Superior Court on 8 January, 1923, and within twenty days thereafter to answer the complaint, which would be deposited in the clerk's office on or before the return day of the summons; (2) that the complaint was duly served with the summons on 28 December, 1922; (3) that the defendants had their attorneys to prepare an answer and tender it for filing after twenty days from the service of the summons and complaint but within twenty days from 8 January, 1923; (4) that the language of the summons was calculated to divert and did divert the mind of the defendants from the proper time for filing the answer, and that they relied upon the mandate in the summons.

As conclusions of law his Honor held that the defense was meritorious and that the language of the summons was sufficient ground for finding, as he did find, that while there was a mistake of law on the part of the defendants in failing to file their answer within the time prescribed, yet that was an inadvertence which entitled them to relief. Thereupon the judgment was set aside and the defendants were given leave to file an answer. The plaintiff excepted and appealed.

T. T. Hicks & Son for plaintiff.
W. H. Yarborough and S. A. Newell for defendants.

ADAMS, J. The judge is authorized, upon such terms as may be just, to relieve a party at any time within one year after notice from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect (C. S., 600), but the several grounds upon which the power may be exercised relate to facts and do not extend to matters of law. *Ignorantia facti excusat, ignorantia juris non excusat.* Ignorance of a material fact may excuse a party, but ignorance of the law does not excuse him from the legal consequences of his conduct. In *Skinner v. Terry,* 107 N. C., 103, the Court, holding that the words "mistake, inadvertence, surprise, and excusable neglect" signify some fact of which the complaining party should have had knowledge and do not include mistakes of law, used this language: "It [the statute] does not imply that the Court may grant a new trial or set aside a judgment for errors of law or upon the ground that the party was ignorant of the law or of his rights and of the methods and means whereby he might assert or enforce them." During the present term the question has again been considered and decided (*Battle v. Mercer, post,* 437), and while it does not call for further discussion, reference may be made to the following additional cases: *Howell v. Barnes,* 64 N. C., 625; *Churchill v. Ins. Co.,* 88 N. C., 205; *Phifer v. Ins. Co.,* 123 N. C., 405; *Mann v. Hall,* 163 N. C., 51, 54.

If the defendants unfortunately relied upon the language of the summons, they were nevertheless affected with knowledge of the statutory provision prohibiting the clerk from extending the period for answering beyond twenty days after service of the complaint, and their "inadvertence" was essentially a mistake of law. In such case the statute affords no relief. C. S., 600; Public Laws, Extra Session 1921, ch. 92.

As it is unnecessary to discuss the merits of the defense we forbear referring to it except to call attention to the defendants' repeated promises to make settlement of the account.

For the reasons assigned, the order of his Honor vacating and setting aside the judgment must be

Reversed.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION v. W. B. MOSS.

(Filed 19 March, 1924.)

1. Contracts, Written—Parol Evidence—Conditions Precedent.

While parol evidence is not permissible to correct, modify, or change the written expressions of a contract, it may thus be shown that the contract depended for its validity upon a condition precedent that had been agreed upon, and that the failure of performance of this condition rendered the contract itself invalid.

2. Same—Co-operative Marketing Associations—Statutes.

Where a member of a coöperative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory.

3. Instructions—Burden of Proof—Conflicting Instructions—Appeal and Error.

Where the judge, in his charge to the jury, properly places the burden of proof on the defendant, and thereafter improperly places it on the plaintiff, it is reversible error in leaving the jury to determine which portion of the charge was the correct one.

APPEAL by plaintiff from *Allen, J.*, at November Special Term, 1923, of WAKE.

Civil action to recover damages for an alleged breach of contract.

Upon denial of liability, and issue joined, there was a verdict and judgment for the defendant. Plaintiff appeals, assigning errors.

Burgess & Joyner for plaintiff.

Aaron Sapiro, Elystus L. Hayes, and Theodore E. Bowen of counsel for plaintiff.

Chas. U. Harris and Jas. S. Griffin for defendant.

STACY, J. The controversy, on trial, narrowed itself to the single question as to whether the defendant was a member of the plaintiff association, it being alleged and denied that he had executed the standard marketing agreement and thereby bound himself to deliver to the plaintiff all tobacco produced by him during the years from 1922 to 1926, both inclusive. Defendant admitted signing the agreement, but contended that this was done on condition, and that the contract was not to take effect except upon a contingency which never happened.

The general rule is that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions.

Overall Co. v. Hollister Co., 186 N. C., 208. But it is equally well established "that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea not that a written contract could be contradicted or varied by parol, but until the specified event occurred the instrument did not become a binding agreement between the parties." *Bowser v. Tarry,* 156 N. C., p. 38. See, also, *Building Co. v. Sanders,* 185 N. C., 328, and cases there cited.

With respect to proving the alleged condition precedent, prior to the happening of which it was agreed the contract should not become effective or operative, his Honor in the beginning of his charge properly placed the burden of proof on the defendant—he having admitted signing the instrument—but in a subsequent portion of the charge, the burden of disproving this alleged collateral agreement was erroneously placed on the plaintiff. 13 C. J., 759; *S. v. Regent Laundry Co.* (Mo.), 190 S. W., 951; *Muehlebach v. Missouri Railway Co.* (Mo.), 148 S. W., 453; *Dillon v. Anderson,* 43 N. Y., 231; Appeal of Kenney (Pa.), 12 Atl., 589.

It is well settled that where there are conflicting instructions with respect to a material matter, a new trial must be granted, as the jury are not supposed to know which one of the two states the law correctly, and we cannot say they did not follow the erroneous instruction. *S. v. Falkner,* 182 N. C., p. 799, and cases there cited.

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

WILSON GREENE ET AL. v. MRS. SALLIE GREENE LYLES ET AL.

(Filed 19 March, 1924.)

Wills—Estates—Contingent Remainders—Defeasible Fee—Trusts.

A devise of lands in equal parts to the testatrix's four daughters and her son, W., with the "exception" each one of them to give the daughter, A., $200 apiece of their portion, and what S. gets to be controlled by the son, W., to give S. a home for herself and children, and at their death to go to her brothers and sisters: *Held,* the testatrix's own daughter, S., and not her children, was the primary object of the testatrix's bounty; and her controlling intent, as ascertained by proper construction from the language used, was to give S. a fee in her part of the lands devised, defeasible on her dying without a child or children surviving, and in that event with remainder over to the brothers and sisters of S., the children of the testatrix, without creating an active trust for the benefit of her daughter, S.

GREENE *v.* LYLES.

APPEAL by Sallie Greene Lyles from *Grady, J.*, at February Term, 1924, of FRANKLIN.

Petition by tenants in common to sell land for division.

From the judgment and order entered, Mrs. Sallie Greene Lyles appeals, assigning errors.

Wm. H. & Thos. W. Ruffin for petitioners.

B. L. Fentress and Roberson, Jerome & Haworth for respondents.

STACY, J. It is conceded that the interest of Mrs. Sallie Greene Lyles in the land ordered to be sold for division depends upon the proper construction of the following provisions in the will of Josie A. Greene:

"This is my will and wishes: I want my husband to have all management of my property until his death, then I want my property divided as follows: My property in Cedar Rock Township divided between my three children, Sallie Greene Lyles, Annie Greene, and Wilson Greene; the land in Cedar Rock Township deeded to me by Eugene S. Greene, Jr., to go back to him. All my other I want it divided equally between our five children—Lillian Watson, Eugene S. Greene, Jr., Sallie Greene Lyles, Annie Greene, and Wilson Greene—with this exception, each one of the above-named children, Lillian, Eugene, Sallie and Wilson, is to give Annie $200 apiece of theirs. What Sallie gets to be controlled by Wilson Greene. I want her to always have a home for her and her children; at their death to go to her brothers and sisters."

In construing the foregoing provisions of the will his Honor held that "a one-third interest in the Cedar Rock Township tract and one-fifth interest in the remaining lands is vested in Wilson Greene as trustee for Sallie Greene Lyles during her natural life, and said trustee being charged with the duty of providing a home for said Sallie Greene Lyles and her children during her life; and upon the death of the said Sallie Greene Lyles the children of the said Sallie Greene Lyles then living, and the issue of any deceased child or children, shall succeed to a fee-simple estate in said share." In this we think there is error.

The intent of the testatrix, as we understand it, was to give her daughter, Sallie Greene Lyles, a fee in the land devised, defeasible on her dying without a child or children her surviving. C. S., 4162. It is clear, we think, that Sallie Greene Lyles, and not her children, was the primary object of the testatrix's bounty. "At their death to go to her brothers and sisters" means that in case all of Mrs. Lyles' children predecease her, then at her death, the death of Mrs. Lyles, without a child or children her surviving, the property shall go to her brothers and sisters. But should Sallie Greene Lyles leave a child or children her surviving, the limitation over would fail, and the fee originally devised would then become absolute.

"Where real estate is devised in fee simple in one clause of the will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt about a subsequent clause, nor by any inference therefrom, or by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee simple; and where a devise is plainly given in fee it will not be presumed that the testator meant by any subsequent words to reduce an estate to one for life, unless the language employed so indicates such intent and is as clear and in as strong terms as words in giving the estate in fee simple." *Watson, J.,* in *Hume v. McHaffie,* 81 N. E. (Ind.), 117. And to like effect are the decisions in North Carolina: *Riley v. Buchanan,* 60 N. C., 479; *Batchelor v. Macon,* 69 N. C., 545; *Holt v. Holt,* 114 N. C., 242; *Jones v. Richmond,* 161 N. C., 553.

Nor do we think the language of the will sufficient to create an active trust in Wilson Greene for the benefit of Sallie Greene Lyles under the more recent decisions. *Hardy v. Hardy,* 174 N. C., 505; *Carter v. Strickland,* 165 N. C., 69, and cases there cited.

Error.

CORPORATION COMMISSION EX REL. RALEIGH GRANITE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 19 March, 1924.)

Corporation Commission — Railroads — Carriers—Lumber Companies — Statutes—Rates—Joint Rates.

A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Corporation Commission, under the provisions of C. S., 1039; and when it is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. C. S., 1071.

APPEAL by defendant from *Calvert, J.,* at October Term, 1923, of WAKE.

The Corporation Commission, on 7 August, 1923, passed an order establishing joint rates on crushed stone from Barham's Siding, on the Montgomery Lumber Company's railroad, to all stations over the Atlantic Coast Line Railroad.

On appeal from such order, the court found the following facts:

"The Raleigh Granite Company owns a granite quarry near Rolesville, in Wake County. This granite is useful as building stone, and

also for curbing, paving blocks, and crushed stone for concrete work. The only transportation line reaching this quarry, which is a great natural exposure of granite, is the Montgomery Lumber Company Railroad. The Raleigh Granite Company has built a connecting track from the Montgomery Lumber Company Railroad, at Barham's Siding, to the stone quarry, and has installed a crushing plant with a capacity of ten cars daily. It delivers this stone from its quarry to the Montgomery Lumber Company Railroad in carload lots at Barham's Siding. There the lumber company railroad takes it up and hauls it to Spring Hope, N. C., where it is delivered in carload lots to the Atlantic Coast Line Railroad for transportation to points beyond Spring Hope.

"In this transportation, previous to the order of the Corporation Commission, the lumber company railroad charged local rates to Spring Hope, and the Atlantic Coast Line Railroad charged local rates from Spring Hope to destination of the stone. These local rates are so high that when the present contracts of the Raleigh Granite Company are completed, all the equipment of the granite company will have to be removed and the quarry abandoned for lack of reasonable rates to points of consumption in North Carolina beyond Spring Hope and over the Atlantic Coast Line Railroad.

"The Montgomery Lumber Company is a North Carolina corporation, duly incorporated under the laws of the State, with authority to purchase timber tracts or timber rights to manufacture the same into lumber, and to do all those things necessary and convenient for the effectuation of those purposes. It is further authorized to purchase or construct tram roads for the transportation of its lumber and timber. The charter does not specifically confer upon it the power of eminent domain or authority to become a common carrier. The Corporation Commission, however, by an order dated 21 March, 1916, under authority of section 1039 of the Consolidated Statutes, granted to the lumber company the privilege to transport all kinds of commodities other than their own and passengers, and to charge therefor rates shown in tariff filed with and approved by the Commission. Since this order the lumber company has transported both freight and passengers along this line.

"The road of the lumber company is of standard gauge and oak ties and its trestles are standard. The iron rails are fifty-pound rails, same size as that operated by the Atlantic Coast Line Railroad on its Spring Hope branch until recently. The road is being maintained as a standard road. The lumber company owns two 75-ton Baldwin locomotives and two 60-ton locomotives for lighter work. In addition to its logging equipment it has six flat cars, twenty gondolas, one box car and one passenger car, which equipment never leaves the tracks of the Montgomery Lumber Company. In the transportation of the product of

the granite company from Barham's Siding on out upon the Atlantic Coast Line Railroad the latter furnishes the cars, which are loaded at the quarry by the granite company and transported by the lumber company to Spring Hope, where the lumber company delivers the cars upon the track of the Atlantic Coast Line, they there being taken up by the Atlantic Coast Line and carried to their destination without any transfer cost or any unloading of the cars. In this way the lumber company delivers to the Atlantic Coast Line at Spring Hope, on an average, five carloads of stone from the granite company per day.

"The application of the granite company for joint rates over these two roads was confined to the product of its quarry, and the order of the Corporation Commission extended no further than the allowance of joint rates on this particular commodity.

"The Atlantic Coast Line Railroad Company has no joint mileage rates in effect with any tram road or railroad authorized by the Corporation Commission to do a limited business in the transportation of freight and passengers, nor has such railroad company any joint mileage scale with any of the short lines in the State of North Carolina except the Randolph and Cumberland. The Randolph and Cumberland Railroad is not a direct connection with the A. C. L. R. R. Co. and the joint scale with that railroad was put in without the approval of the A. C. L. The Randolph and Cumberland Railroad Company is a short-line carrier. The joint rates put into effect upon that railroad related only to crushed stone, gravel and sand. The Montgomery Lumber Company has not published in its tariff any rate on stone from Barham's Siding to Spring Hope, but a rate of sixty cents per ton has been charged, based on an application to the Corporation Commission and pending decision by the Commission on that application.

"The lumber company does not issue any through bills of lading from points on its line to points on the Atlantic Coast Line Railroad. All traffic from points on the road of the lumber company is delivered to the Atlantic Coast Line Railroad at Spring Hope as local Spring Hope shipments, and shipments that come into Spring Hope from points on the A. C. L. Railroad to points reached by the lumber company railroad are delivered by the Atlantic Coast Line Railroad to the lumber company railroad at Spring Hope. The lumber company does not issue through bills of lading, and shipments from points on the lumber company's line that are intended for transportation beyond Spring Hope are delivered to the A. C. L. Railroad at Spring Hope by the lumber company acting as agent for the shipper. The lumber company has only one station between terminals, which is at Bunn, N. C., and it there maintains its only station agent. It has a terminal at Barham's Siding, but has no agent there. The Atlantic Coast Line

Railroad has a contract with the Montgomery Lumber Company covering the hauling on its line of the Atlantic Coast Line Railroad Company's equipment. Shipments going to points on the Montgomery Lumber Company's line from points on the A. C. L. Railroad are billed to Spring Hope, N. C. The shipper of any commodity except crushed stone from points on the lumber company's line to points on the A. C. L. now pays full local rates to Spring Hope, and from Spring Hope to points on the Atlantic Coast Line, and will continue to pay such full local rates if the order of the Corporation Commission in this case becomes effective.

There is no evidence in the case that if the Corporation Commission has authority to make joint rates between a lumber road of the class to which the Montgomery Lumber Company's railroad belongs and a trunk line, that the rates established by the Corporation Commission on this application are confiscatory.

Upon motion of the Attorney-General, it is thereupon ordered and adjudged:

"(1) That the said Montgomery Lumber Company is a common carrier of goods and freight.

"(2) That the Corporation Commission had legal power and authority to make the joint rates in this proceeding.

"(3) That said joint rates are reasonable in amount.

"(4) That because they apply only to the product of the Raleigh Granite Company, and do not apply to other classes of freight hauled by the Montgomery Lumber Company and delivered to the Atlantic Coast Line at Spring Hope, does not create any illegal or unconstitutional discrimination against other classes of freight, the nature of the commodity itself being such as to justify the classification.

"(5) That the order of the Corporation Commission herein be and the same is hereby in all particulars affirmed." The defendant A. C. L. R. R. Co. appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Murray Allen and Thos. W. Davis for defendant.

CLARK, C. J. The Atlantic Coast Line Railroad excepts upon the ground that the Montgomery Lumber Company Railroad is not such a common carrier that the Corporation Commission had authority to establish and compel the putting into effect joint rates between it and the A. C. L. Railroad.

In this case the joint rates are established for only one commodity, crushed stone, etc., a product of the Raleigh Granite Company's plant

near Rolesville. The Corporation Commission, 21 March, 1916, upon the application of said Montgomery Lumber Company, authorized it to carry freight and passengers and charge therefor, and the order then made was as follows: "Ordered by the Corporation Commission that the said Montgomery Lumber Company be and it is hereby authorized to transport over and upon its said logging road all kinds of commodities other than its own, except sawed logs, and also passengers, and to charge therefor the rates in accordance with freight tariff and classification and passenger tariff, which has this day been approved by the Commission for this line of road, subject to such changes and modifications as may from time to time be made or approved by this Commission."

It is quite clear that the State has authority to declare a lumber company railroad, such as that figuring in this case, a common carrier upon its own application. In *U. S. v. R. R.*, 234 U. S., at p. 24, it is said: "It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character."

In this case the Montgomery Lumber Company Railroad, on its own application, under C. S., 1039, was created a limited public carrier by order of the Corporation Commission, 21 March, 1916, above set out. It is 27 miles long, substantially built, and well equipped in the manner set out by the findings in this case. The Commission was acting for the State through its prescribed machinery in accepting the Montgomery Lumber Company Railroad as a common carrier and imposing upon it, with its consent, the duties, privileges and liabilities of such relation to the public. It makes no difference that under the original charter of the lumber company railroad it did not have authority to act as a common carrier or to exercise the power of eminent domain. The question before us is, this company having been made a common carrier under authority of the statute of this State, did the Corporation Commission have authority to make joint rates set out?

C. S., 1071, is as follows: *"Authority to make joint rates.*—The Commission shall, from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedule of rates fixed by the Commission or allowed to be charged by any carrier of freight, passengers or express, or by any telegraph or telephone company. The powers of the Commission, under this sec-

tion, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 5 of this chapter and article 10 of the chapter entitled 'Railroads.' "

Article 5 herein referred to is chapter 20, Laws Extra Session 1913, and it limited the authority of the Corporation Commission as to increasing the maximum rates for freight carriers under that chapter. Indeed C. S., 1080, provides: "Except where the Corporation Commission shall order or has ordered to the contrary, the following specified rates are declared to be reasonable maximum rates to be charged by railroad companies owning, operating, controlling or maintaining 75 miles or more of railroad in North Carolina."

So far even as maximum rates are concerned the act of 1913 imposed no limitations upon the Corporation Commission for such rates on a railroad less than 75 miles long. Hence section 7 of the act of 1913, now C. S., 1083, expressly confers authority upon the Corporation Commission to investigate rates upon the request of any person directly interested. It permits that body to hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission and to establish such rates as it may deem just. The authority conferred upon the Commission is plenary.

On 21 March, 1916, the Commission, under the authority contained in C. S., 1039, ordered that the Montgomery Lumber Company Railroad should be a limited public carrier, and since that time it has been handling freight, both carload and less, locally between Spring Hope and points on its line, and charging therefor rates set out in the tariff filed with the approval of the Commission.

C. S., 1039, reads: "The Corporation Commission has power to authorize lumber companies having logging roads to transport all kinds of commodities other than their own, and passengers, and to charge therefor reasonable rates to be approved by the Commission."

The defendant contends, however, that the Corporation Commission did not have authority to make joint rates between a standard railroad company, such as the A. C. L., and a lumber road, which has no charter authority to act as a common carrier or to exercise the power of eminent domain.

The only question for us to consider, however, is the authority of the Corporation Commission to authorize the lumber company to act as a common carrier, which authority is clear upon the above-recited statutes and the facts found by the court.

The Court has held that the expression in C. S., 3465—the Fellow-Servant Act—that "any railroad company operating in this State" is broad enough to include lumber roads. *Hemphill v. Lumber Co.,* 141 N. C., 487. This ruling of the Supreme Court was approved 16 times

between *Hemphill's case* and *Goodman v. Power Co.,* 174 N. C., 661. While it is true that the Court in *Williams v. Mfg. Co.,* 175 N. C., 226, held that the comparative negligence statute, C. S., 3467 to 3469, inclusive, did not apply to lumber roads on account of the peculiar wording of the act—"common carrier by railroad"—but the General Assembly of 1919, in consequence of this decision, extended these sections to apply to logging roads and tram roads. C. S., 3470.

The Raleigh Granite Company is a newly opened and extensive bed of granite, the transportation of which at reasonable rates is a matter of public interest to the State Highway Commission and all engaged under its contracts. Prior to the order of the Corporation Commission of 7 August, 1923, which is here appealed from, the shipment of granite over the Montgomery Lumber Company's road had to pay two full charges: one from the quarry to the terminus of the Spring Hope branch of the Coast Line and the other over the Coast Line Railroad. In prescribing joint rates which the Commission was authorized to do, there was a market made for this granite in competition with granite from other quarries. If deprived entirely of this competition by lack of reasonable rates which the Corporation Commission was authorized to fix, it was entirely possible that this growing industry might have been choked off and bought out by some competing quarry or be so bottled up as to be unremunerative. It is for this very reason that the Corporation Commission was authorized to make the order imposing joint rates, and in this action the Court has reviewed the evidence at length and affirmed that ruling. There are very many cases in the Public Utilities Reports which throw light on the subject: *Public Utilities Co. v. R. R.,* P. U. R., 1915-A, p. 10, which compelled a standard railroad to make joint rates with a terminal railroad.

Tarpey v. Sou. Pacific Ry., P. U. R., 1915-D, p. 621, which required a standard railway to make joint rates with an automobile stage line.

State Normal School v. R. R., P. U. R., 1918-D, p. 537, which adjudged that a standard railway company should make joint rates with a street railway. See, also, the *Tap Line cases,* 234 U. S., pp. 1 and 36, and 240 U. S., p. 295.

This case is one of great public interest, as upon the authority to fix joint and reasonable rates for their output depends the ultimate success of this enterprise, which will become in all probability a large contributor towards the extension of our State Highway system and great quarry for building and other purposes.

His Honor has reviewed and passed upon the findings of fact and of law of the Corporation Commission and has affirmed the same, and upon full consideration this action is

Affirmed.

J. O. BLUE, W. H. RICHARDSON AND BESSIE CAMERON v. BOARD OF TRUSTEES OF VASS GRADED SCHOOL DISTRICT, BOARD OF COMMISSIONERS OF MOORE COUNTY, AND BOARD OF EDUCATION OF MOORE COUNTY.

(Filed 19 March, 1924.)

1. Schools—County-wide Organization—School Districts—Consolidation—Statutes.

The statute, chapter 136, Laws of 1923, is a codification with certain modifications or changes of the then existing school laws of the State upon a county-wide plan of organization designing to make them more harmonious and efficient under a workable system for the counties adopting it.

2. Same—Taxation—Bonds.

Where a county has adopted the statutory county-wide plan of organization for its public school system, its board of education is empowered to establish new school districts or to consolidate or enlarge existent districts and to provide for levying of local taxes therein and issuing bonds when authorized by orders and election had as directed by articles 6, 17, 18 and 22 of the act.

3. Same—Enlargement of Existing Districts.

While under article 18 of the county-wide plan for the organization of public schools the public authorities are restricted to districts having established or recognized boundaries (section 234), under the authority of article 17 elections may be had, among other things, for enlarging an established district by including adjoining territory, and levying a tax thereon on petition of the governing board of the principal district and upon approval of the voters of the outside territory to be added as indicated in section 226 of the statute.

4. Same—Elections—Approval of Voters.

While special charter school districts do not as a rule come within the compulsory regulations of the public school authorities unless or until they have surrendered their special charter, chapter 136, Laws of 1923, sec. 157, the school authorities, under section 226, are empowered to enlarge one of these districts having a special tax, by adding outside adjoining territory so that it comes under the governing authorities of the special charter district thus enlarged, when the approval of the voters of the outlying territory proposed to be added have approved thereof at an election held for the purpose as directed by the statute. C. S., 5530, revised.

5. Same—Constitutional Law.

Under the provisions of the statute providing for a county-wide system of education, the school board, by proper procedure, is authorized to divide an existent school district therein (chapter 136, Laws of 1923, article 6) ; and the statute in relation thereto is constitutional and valid with the limitation that provision be presently and ultimately made for proper school facilities for the children therein. *Sparkman v. Comrs.*, *ante*, 241, cited and approved.

6. Same—Abolition of Existing Districts.

Where, in accordance with the provisions of chapter 136, Laws of 1923, an existent special charter tax district has been enlarged to take in added and adjoining territory, it is not required that such district should have first been abolished to make the consolidation valid according to sections 227, 228, the requirements of these sections being intended to provide for the abolition of local-tax districts when that was the single question presented.

CIVIL ACTION heard and determined by consent before his Honor, *Shaw, J.*, holding the Superior Court at Carthage, N. C., on 25 January, 1924.

The action is to restrain the enlargement of the Vass School District in Moore County, and a proposed $50,000 bond issue voted by said enlarged district for school purposes therein.

On the hearing it appeared from the admissions in the pleadings and affidavits filed that under the consolidated law, chapter 136, Laws 1923, a county-wide plan had been duly adopted providing, among other things, "That Vass be made a school center so as to take in a portion of Crane's Creek School District, Moore's Hill, the Lakeview District, and some territory between the Lakeview District and the Camp Bragg line." That the territory to be added to Vass having been surveyed and properly delimited by surface boundaries, so as to include the Lakeview District, part of the Crane's Creek District, and the outlying territory as indicated, an election was held under the new school law, and the proposed measure was approved by a large majority of the voters of the added territory, and was also approved by a majority of the voters of each constituent part of the added territory. It further appeared that in a vote of the Vass District as enlarged a majority of the voters had duly cast their votes for the proposed bond issue. On these, the facts chiefly pertinent, the court entered judgment as follows:

"This cause coming on to be heard upon the complaint used as an affidavit, and the defendants entering a general appearance and waiving notice and filing answer, after hearing evidence and argument of counsel, the court being of the opinion that chapter 136, Public Laws of 1923, contains full authority for the action of the county board of education in dividing Crane's Creek District, and the court having found from the evidence that a majority of the voters in that part of Crane's Creek School District included in the enlargement of the Vass Graded School District voted for said enlargement, and a majority of the voters of the nonlocal-tax territory included in the enlargement voted for the said enlargement, and the court being of the further opinion that the vote of the majority of the voters of the Lakeview School District for the enlargement repealed the local tax theretofore

voted in said district, and the court being of the further opinion that the said election upon the enlargement of the Vass Graded School District being in all respects valid, that the election upon the bonds of the enlarged school district was also in all respects valid.

"It is now, therefore, ordered, adjudged and decreed that prayer of plaintiff be denied. Defendants will recover their costs. This 25 January, 1924.

THOS. J. SHAW,
Judge Presiding."

Plaintiff excepted and appealed.

U. L. Spence for plaintiffs.
J. L. Morehead for defendants.

HOKE, J. Chapter 136, Laws of 1923, purports to be a codification of the public school law of the State, containing the existent statutes relating to the subject, with certain modifications and additions designed to make it a more harmonious, efficient and workable system. Probably the most important addition to the former law is that which provides for a county-wide plan of organization, which is to afford the basis for the proper administration of the school law in the respective counties of the State. This plan appears chiefly in section 73a of the statute referred to, and on matters more directly pertinent to this inquiry is as follows:

"COUNTY-WIDE PLAN OF ORGANIZATION

"The county board of education shall create no new district nor shall it divide or abolish a district, nor shall it consolidate districts or parts of districts, except in accordance with a county-wide plan of organization, as follows:

"1. The county board of education shall present a diagram or map of the county showing the present location of each district, the position of each, the location of roads, streams and other natural barriers, the number of children in each district, the size and condition of each school building in each county. The county board of education shall then prepare a county-wide plan for the organization of all the schools of the county. This plan shall indicate the proposed changes to be made and how districts or parts of districts are proposed to be consolidated so as to work out a more advantageous school system for the entire county.

"2. Before adopting the county-wide plan, the county board of education shall call a meeting of all the school committeemen and the boards of trustees and lay the proposed plan before them for their advice and suggestions. After receiving the advice of the committee-

men and trustees, the county board of education shall have authority to adopt a county-wide plan of organization, and no districts or parts of any district, including nonlocal tax, local tax, and special charter districts, hereafter referred to in this article, shall be consolidated or the boundary lines changed, unless the consolidation or the change of boundary lines is in accordance with the adopted county-wide plan of organization: *Provided,* that in the event the county board of education deems it wise to modify or change the adopted plan, the board shall notify the committeemen and interested patrons and give them a hearing, if they desire to be heard, before any changes shall be made. . . .

"5. In the event that any child or children of any district or any part of a district are without adequate school advantages, and these advantages may be improved by transferring said child or children to a school or schools in adjoining districts, the county board shall have authority to make such a transfer. But this shall not empower the county board of education to abolish or divide a district unless such act shall be in harmony with the county-wide plan of organization. The temporary transfer of such child or children may be made until such time as the county-wide plan will provide more advantageously for them."

Having adopted the plan as indicated, and in pursuance of same or modification thereof, made as the statute provides, the county boards of education are empowered to establish new school districts, or to consolidate or enlarge existent districts, and to provide for levying of local taxes therein and issuing bonds, etc., when authorized by orders and elections had as directed by articles 6, 17, 18 and 22, School Law.

In holding an election under article 18, the authorities are restricted to districts having established or recognized boundaries, such as a school district or township, or contiguous school districts or townships. Cons. School Law, sec. 234; *Sparkman v. Comrs., ante,* 241. But under article 17, elections may be had for the various purposes therein specified, and among them a district may be enlarged and a taxing district established in the same on petition of the governing board of the principal district, and on taking the vote of the outside territory to be added, as indicated in section 226 of the statute.

It may be noted that the original Vass Graded School is a special charter district, defined in section 3 of the act to include school districts incorporated by special act of the Legislature, and having its own board of trustees with duties prescribed by its charter, and extending also to school districts whose bounds are coterminous with incorporated cities and towns, and whose governments without special charter are empowered to establish a system of schools to be governed and controlled by a special board.

Such special charter districts do not as a rule come within the compulsory regulations of the public school authorities unless and until they have surrendered their special charter according to the provisions of section 157 of the School Law, but there is no reason why the school authorities under proper legislative sanction may not add to a special charter district outside territory, in enlargement of same, and which would thereby come also under the governing authorities of the special district. Such sanction appears in section 226 of the present law, which in our opinion on proper compliance confers the power on the public authorities to enlarge the special charter districts, and on these districts to receive and regulate and control the added territory. This section 226 is as follows:

"*Enlargement of Local Tax or Special Charter Districts.*—Upon a written petition of a majority of the governing board of any district the county board of education, after approving the petition, shall present the same to the board of county commissioners and ask for an election on the question of the enlargement of the boundary lines of any such district so as to include any contiguous territory, and an election in such new territory may be ordered and held under rules governing elections for local taxes as provided in this article: *Provided,* the local tax rate specified in the petition and submitted to the qualified voters shall be a local tax of the same rate as that voted in the said district to which the territory is to be added. If a majority of the qualified voters in such new territory shall vote in favor of such tax, the new territory shall become a part of said district, and the term 'local tax of the same rate' herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged. In case a majority of the qualified voters at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (C. S., 5530, revised.)"

And it appearing that all of its provisions have been duly complied with, the proposed enlargement properly approved by the voters of the outside territory, and the proposed bond issue by the voters of the district as enlarged, we are of opinion that no valid objection has been shown to either measure, and the judgment of the Superior Court to that effect is affirmed.

It is contended chiefly for appellant that under the general school law the authorities are without power to divide an existent district, but in our opinion the exception cannot be maintained. Under article 6, dealing principally with the establishment and consolidation and enlargement of districts, etc., including the adoption of a county-wide plan, as contained in section 73a, it is clearly contemplated that under

ordinary circumstances a district may be divided if deemed necessary. Thus, in the opening clause of section 73a, it is provided: "The county board of education shall create no new district, nor shall it divide or abolish a district, nor shall it consolidate districts or parts of districts, except in accordance with a county-wide plan of organization, as follows," etc. In subsection 2 it is stated: "No districts or *parts* of districts shall be consolidated unless in accordance with the adopted county-wide plan." And in subsection 5 it is provided, among other things: "That the county board shall not abolish or divide a district unless such act shall be in harmony with the county-wide plan."

As said in the recent case of *Sparkman v. Comrs., ante,* 241: "But apart from the obligation to pay existent indebtedness, which is amply protected and preserved by the law itself, there is nothing contractual about the existence and continued maintenance of these school districts."

And in the well-considered case of *Board of Education v. Bray,* 184 N. C., 484, it is held, among other things: "That, apart from questions of taxation and proper provision for bonded or other indebtedness, the establishment and continued maintenance of these districts is in the sound discretion of the school authorities, with the limitations existent in the present law: (*a*) that they may only be altered in accord with a county-wide plan or lawful modification thereof; (*b*) that in any such change the authorities shall see to it that all the children are presently and ultimately provided for." 73a, subsection 5, and section 75.

And in reference to the formation and change of local-tax districts by enlargement, in section 226 it is required that the proposed measure shall be approved, as stated, by the voters of the new district, and on such approval "the local tax rate specified in the petition and submitted to the qualified voters shall be a local tax of the same rate as that voted in the said district to which the territory is to be added. If a majority of the qualified voters in such new territory shall vote in favor of such tax, the new territory shall become a part of said district, and the term 'local tax of the same rate' herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged. In case a majority of the qualified voters at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (C. S., 5530, revised.)"

When such an enlargement has been approved, as stated, and in pursuance of a county-wide plan, as in this instance, there seems to be no requirement that the measure should be also approved by each constituent part of the new territory, and if it were otherwise, in the

present case it appears that as a matter of fact there was a majority of votes for the proposed enlargement in each of the component parts of the territory to be added. *Heckert v. Graded School,* 184 N. C., 475.

It is further insisted that even if the power to divide a special-tax district is conferred, it can only be exercised after such district has been abolished according to sections 227-228 of the statute. But these sections in our opinion were intended to provide a method for the abolition of a local-tax district when that was the single question presented, and same do not and were not intended to apply to or affect the enlargement of a district under section 226 of the statute, and other portions of the law, in pursuance of a county-wide plan.

We consider it well to note as appearing of record that the portion of the Crane's Creek School District and the children therein, not included in the enlargement of the Vass District, have been properly cared for by a similar enlargement of the Cameron School District, a measure that was approved by the voters of those two territories, and which is also in accord with the county-wide plan adopted for Moore County.

We find no error in the record, and the judgment of the court below is

Affirmed.

THOMAS H. BATTLE, H. E. BREWER, A. P. THORPE, T. L. BLAND AND THE ROCKY MOUNT SAVINGS & TRUST COMPANY, TRUSTEES OF THE R. H. RICKS ESTATE, v. MARY S. MERCER, JOHN R. MERCER, T. C. TILGHMAN AND MARGARET M. TILGHMAN, HIS WIFE, ERNEST M. TILGHMAN AND MARY M. TILGHMAN, HIS WIFE, LEWIS S. THORPE AND RUTH M. THORPE, HIS WIFE, AND LENOIR MERCER.

(Filed 19 March, 1924.)

1. Appeal and Error — Motions—Judgments—Excusable Neglect—Findings of Fact—Conclusions of Law.

In passing upon a motion to set aside a judgment for excusable neglect, the findings of the trial judge, upon supporting evidence, are conclusive on appeal, leaving reviewable only his conclusions of law thereon.

2. Same—Statutes—Defendant in Possession of Lands—Title—Pleadings—Bond.

Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, Public Laws of 1921, ch. 92, sec. 1 (3), the ignorance of the defendant that he was required to file the bond, before answer, required by C. S., 495, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment

aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof.

3. Same—Pari Materia.

C. S., 595 (4) and 495, are *in pari materia* with Public Laws of 1921, ch. 92, sec. 1 (3), and should be construed together, and the requirements of section 595 (4) must be observed that in an action for the recovery of real property, or for the possession thereof, the defendant in possession must give bond before answer, unless he has been lawfully excused therefrom or the plaintiff has waived his legal right thereto.

4. Pleadings—Statutes—Clerks of Court—Jurisdiction—Time Extended.

Where the summons is served with the copy of the complaint, under the provisions of chapter 92, Public Laws of 1921, the clerk of the Superior Court is not given the power to extend the time of the filing of an answer beyond twenty days after the service has been made.

5. Same—Superior Court—Judge.

Under the provisions of chapter 92, section 1 (18), Public Laws of 1921, the power of the Superior Court judge to allow amendments to pleadings given by C. S., 547, or to allow answer to be filed, C. S., 536, applying also to the defendant in possession of lands and claiming an interest therein giving bond, C. S., 495, is not affected.

6. Tenants in Common—Possession—Title—Bond—Statutes—Pleadings.

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of C. S., 495, and must file the bond therein required, according to law, before answering the complaint.

APPEAL by defendants Mary S. and John Mercer, T. C. Tilghman and Margaret M. Tilghman from *Connor, J.*, at October Term, 1923, of EDGECOMBE.

Civil action. The facts necessary for a decision of this case are set forth in the judgment of the court below, as follows:

"This cause coming on to be heard before the undersigned, George W. Connor, judge, holding courts of Second Judicial District, upon appeal of Mary S. Mercer, John R. Mercer, T. C. Tilghman and Margaret M. Tilghman, his wife, from judgment by default final in favor of plaintiffs rendered by A. T. Walston, C. S. C., 5 November, 1923, and upon motion of some parties to set aside the said judgment for that it was taken through inadvertence, surprise and excusable neglect; Mrs. Mary S. Mercer, Mrs. Margaret M. Tilghman and John R. Mercer appearing in person and by counsel, to wit, O. P. Dickinson, O. G. Rand and E. B. Grantham, and the court having heard evidence and argument, finds the following facts:

"1. This is a civil action brought by the plaintiffs against the defendants for recovery, as stated in the complaint, of real property described therein.

"2. Summons was issued 29 September, 1923, and verified complaint filed same day. Summons and copies of complaint were personally served upon the defendants Mary S. Mercer and John R. Mercer on 1 October, 1923, and upon Margaret M. Tilghman on 8 October, 1923.

"3. Defendant John R. Mercer filed no appearance, answer, defense bond, motion to fix amount of bond, or affidavit and certificate in lieu of bond prior to the rendition of the judgment appealed from.

"4. Defendants T. C. Tilghman and Margaret M. Tilghman, on 20 October, 1923, tendered to clerk Superior Court what purported to be an answer to the complaint, claiming title and possession to one-fifth interest in a part of the lands described in the complaint. That said clerk, when said answers were tendered, informed said defendants that he would mark the answers filed but that in law they would not be filed unless they complied with the law as to filing defense bond or making a showing in lieu thereof.

"5. Defendant Mary S. Mercer, on 22 October, 1923, tendered to the clerk of Superior Court what purported to be an answer to the complaint, claiming title, possession, and right to possession of lands described in the complaint. That said clerk when said answer was tendered informed said defendant that it would not be filed unless she complied with the law as to filing defense bond or making a showing in lieu thereof.

"6. That neither of the defendants above named at any time tendered any defense bond or affidavit and certificate in lieu thereof, made any motion to have the amount of bond fixed until after 30 October, 1923, and until more than twenty days had expired from the time of service of the summons and complaint on said defendants. That on 1 or 2 November said clerk was asked by defendant John R. Mercer what the amount of the bond would be, and informed said defendant that the bond would have to secure the amount of rents and profits alleged in the complaint and admitted in the answer, to wit, $6,000, unless counsel for plaintiffs agreed to a smaller sum.

"7. That on 5 November, 1923, the first Monday in the first month after time for above-named defendants to file defense bond and answer had expired, plaintiffs, after having first given notice to defendants by letter addressed to O. P. Dickinson, Wilson, N. C., of counsel for defendants, dated and mailed at Rocky Mount, N. C., on 3 November, 1923, and duly received by him on 4 November, 1923, of the purpose to make motion before the clerk to strike out the proposed answer and to give judgment by default final for possession and title of said lands as against the defendants without judgment for rents and profits.

"8. On said 5 November, 1923, the clerk allowed said motion and gave judgment accordingly, and found the facts as stated herein.

"9. On 14 November, 1923, defendants Mary S. Mercer, T. C. Tilghman and Margaret M. Tilghman moved before the clerk to set said judgment aside, and upon his denial thereof gave notice of appeal to judge of Superior Court.

"10. On 21 November, 1923, said defendants moved before the undersigned judge to set said judgment aside for mistake, surprise or excusable neglect.

"11. From the evidence adduced on counsel's admissions in open court it appears that defendant Margaret M. Tilghman and her husband, T. C. Tilghman, executed and delivered in 1906 to W. P. Mercer, father of the said Margaret, the deed for her interest in said land, which deed is described in the answer which was duly recorded in Edgecombe registry in 1909, and is complete and regular on its face. Thereafter W. P. Mercer mortgaged said land through the foreclosure of which mortgages the plaintiffs claim title.

"12. From the evidence adduced and admission of counsel in open court, it appears that foreclosure sale under the mortgages, at which plaintiffs purchased, was duly advertised in accordance with the terms thereof, and that J. P. Bunn, substituted trustee, was appointed by valid instruments in writing duly recorded in accordance with the provisions of the several mortgages which expressly authorized such substitution.

"13. No evidence of payment of usury on said mortgage loans has been adduced by defendants.

"14. Said mortgages were in default at time of foreclosure, and no one of the defendants has ever tendered payment of the amount due on said mortgages as admitted by them.

"15. That no defense bond was tendered by any of the defendants with the motion to set aside the judgment of the clerk.

"Wherefore, the court finds and orders, adjudges and decrees:

"(*a*) That the judgment of the clerk appealed from was regularly rendered according to law, and same is hereby affirmed on defendant's appeal.

"(*b*) That neither of the defendants Mary S. Mercer, John R. Mercer, T. C. Tilghman or Margaret M. Tilghman has a meritorious defense to this action.

"(*c*) That said judgment was not taken by mistake, inadvertence, surprise or excusable neglect, the only excuse for neglect brought to the court's attention being misapprehension as to the requirements of law in such cases.

"(*d*) That the motion to set aside judgment aforesaid is hereby denied.

"(*e*) That plaintiffs recover the costs of this action."

The defendants made numerous exceptions and assignments of error and appealed to this Court. In their brief they succinctly state their exceptions and assignments of error, as follows:

"The only exception that is shown by the record that was made by the defendants in the lower court was to the signing of the judgment and the finding of facts contained therein.

"The assignments of error committed in signing the said judgment are numerous and we deem it unnecessary to discuss them separately. The combined substance of them is that the conclusions of law arrived at by the trial judge upon his own findings of facts were erroneous, and that upon said facts the judgment as a matter of law should have been set aside for irregularities and for excusable neglect; and that from said facts and the record, the rendition of said judgment amounted to an abuse of discretion."

Battle & Winslow and L. V. Bassett for plaintiff.

O. P. Dickinson and J. C. Biggs for defendants Margaret M. Tilghman and T. C. Tilghman.

Woodard & Rand and R. H. McPhail for defendant Mary S. Mercer.

E. B. Grantham for defendant John R. Mercer.

CLARKSON, J. This was a motion to set aside a judgment for excusable neglect. The court below found "that neither of the defendants Mary S. Mercer, John R. Mercer, T. C. Tilghman or Margaret M. Tilghman has a meritorious defense to this action."

In *Farmers and Merchants Bank v. Otho H. Duke, Admr., ante,* 389, it is said: "It is well settled in this State that the application should show not only mistake, inadvertence, surprise or excusable neglect, but *also a meritorious defense. Land Co. v. Wooten,* 177 N. C., 250, and cases cited; 23 Cyc., 962, 1031."

As to the merits of the controversy, the plaintiffs in their brief say:

"This is an ejectment suit brought by certain fiduciaries to recover possession from Mrs. Mercer and members of her immediate family of the Dr. Mercer home place purchased by plaintiffs under foreclosure, in an effort to save their trust estate from loss arising from the endorsement by their decedent of certain bonds executed by Dr. and Mrs. Mercer for borrowed money. Plaintiffs realize that the judgment in their favor was based upon a technical default on the part of the defendants, and perhaps would not feel justified in insisting upon the advantage thereby gained unless they and their counsel were thoroughly convinced that the result is consonant with right and justice, and that in insisting upon a technicality they are merely using the most direct method of reaching the result which justice and fairness and good conscience would in any event finally arrive at, thus avoiding loss which

would otherwise be sustained by their trust estate in consequence of delay in bringing the controversy to an end.

"The suit involves, as to Mrs. Tilghman, a one-fifth interest in some five hundred and fifty acres of land; as to Mrs. Mercer, it ostensibly involves a life estate in said land, but in reality any equity which she may have in said land will be absorbed by a multitude of judgments docketed against her. She has nothing to gain or lose by the determination of this appeal except delay. The complaint is for the recovery of some 2,300 acres of land, but the defendants assert title only to that part which is designated as the Home Place, containing 550 acres, more or less.

"The defense raised by Mrs. Tilghman is based upon the following: In 1906 she and her husband, both *sui juris,* executed and delivered to her father, Dr. W. P. Mercer, a deed conveying to him her interest, namely, an undivided one-fifth after his life estate, in the W. P. Mercer Home Place. The deed is admittedly regular and complete in form and contains a certificate of private examination signed by B. P. Jenkins, justice of peace, and was also duly probated and registered in 1909. Some ten years later Dr. Mercer mortgaged the land and the plaintiffs purchased at the foreclosure sale under said mortgage. B. P. Jenkins was in fact an acting justice of the peace, and the certificate of acknowledgment is in his own handwriting. Both Jenkins and Dr. Mercer are dead. In 1923, for the first time, Mrs. Tilghman contended that although she and her husband executed and delivered the deed she was never privately examined, and that the certificate of private examination was a fraudulent act on the part of the magistrate, procured by her father without her knowledge. After she has sat for seventeen years since the execution of the deed and watched her father support her mother and raise her younger brother and sisters as she had been raised, on a scale of rural antebellum luxury, and had seen him, on the faith of the title vested in him by her deed, borrow money with which to support his family, for her now to assert after the death of her father and the magistrate that the certificate of private examination is the result of a fraud on the part of her father and the magistrate, is a course of action which shocks the conscience of any honest man who hears it and cannot commend itself to the conscience of the court as a meritorious defense. A meritorious defense must be something more than a legal defense, otherwise the decisions would have used the simpler word 'legal.' It must be a defense which commends itself to the conscience of the court. Furthermore, in view of C. S., 1001, as to conclusiveness of certificate of officer taking the private examination, it would seem that the contention of Mrs. Tilghman would not even be a *prima facie* legal defense."

The defendants, in their brief, say:

"The record and statement of case on appeal will show that the several plaintiffs are the trustees named in the will of R. H. Ricks, deceased, of Edgecombe County, North Carolina, who was a wealthy and influential man in his community, and that the defendants are the widow and children of Dr. W. P. Mercer, deceased, another wealthy and influential citizen of Edgecombe County; that the estate of the said Dr. W. P. Mercer was indebted to a life insurance company of the State of Virginia and others; that the holders of the notes and mortgages against the said estate had sought to foreclose the mortgages by advertising certain lands in Edgecombe and Warren counties for sale under the said mortgages; that certain controversies were existing between the holders of said notes and mortgages and the heirs at law of the said Dr. W. P. Mercer; that a temporary injunction had been granted against the sale of the lands described in the said mortgages; that the said injunction had been dissolved, and that on the day of the sale the attorneys for the defendants personally appeared at the said sale and notified the plaintiffs through their attorneys, who were present, that they were setting up certain claims against the holders of the said notes and mortgages, and that the purchasers of the said land would take due notice thereof; that for some reason, not disclosed in the record, the plaintiffs became the purchasers of the said lands and almost immediately thereafter, in the month of October, before the crops were gathered, instituted an action in the Superior Court of Edgecombe County, North Carolina, against the defendants, claiming the title and right to the immediate possession of the said land described in the complaint, which aggregated more than two thousand acres; that some of the defendants resided upon the said land, some in the town of Wilson, North Carolina, and some outside of the State of North Carolina; that personal service was had only upon three of the said defendants, and an order procured by the plaintiffs for service of the summons upon the nonresident defendants by publication.

"That plaintiff's attorneys lived in the town of Rocky Mount, North Carolina, and that defendants were represented by different attorneys, one being represented by an attorney at Rocky Mount, North Carolina, and three by attorneys in Wilson, N. C.; that the complaint contained only three allegations, one as to the title and right to the possession of the land, one describing the land, and the last alleging the amount of rents and profits of the same; that the said complaint contained no allegations explaining the source of the title under which the plaintiffs claimed the right to the said land; that notwithstanding the fact that the defendants and their various attorneys were scattered, and that some of the defendants had to be served by publication, that

some of the resident defendants actually filed answers denying the allegations contained in the complaint and made inquiries as to the amount of the bond to be required by the clerk; the plaintiff's attorneys made a motion on 5 November, before the said clerk, to strike out the answers which the record shows had been filed, and then asked for judgment immediately, settling the title to more than 2,000 acres of land in one of the most fertile sections of the State of North Carolina; and the judgment, which is a part of the record, shows that the only notice that had ever been given the defendants of the intention of the plaintiffs to pursue this course was contained in a letter written on 3 November, 1923, by K. D. Battle, of counsel for the plaintiffs, of Rocky Mount, N. C., to O. P. Dickinson, of counsel for defendants, in Wilson, North Carolina, and which was received by him on Sunday, 4 November, 1923, and service on the said notice was never accepted by any one. Indeed, when the clerk signed the judgment he didn't know the said letter had ever been received, and the record would be silent now on that point except for the reply of O. P. Dickinson, set out in his letter (page 29 of record).

"The affidavits of Margaret M. Tilghman and her attorney, O. P. Dickinson, contained in the record, will show that the said letter was never actually read by the said O. P. Dickinson until the day the said judgment by default was signed by the clerk, and that the answer of Margaret M. Tilghman and her husband, T. C. Tilghman, was not actually filed by the defendants but was filed by their attorney, O. P. Dickinson, by mailing the same to the clerk, and that while the same was actually filed the said clerk did not acknowledge receipt of same. The said affidavits also show that the defendants Margaret M. Tilghman and T. C. Tilghman were not in possession of the said land or any part of the same, and never had been in possession of the same, and that they could not be required to give any defense bond.

"It is contended by the defendants that the said default judgment as to the defendants Margaret M. Tilghman and T. C. Tilghman was irregularly rendered and without any authority, and that their answers could not be stricken out because of their failure to file bond since they could not be required under the law to file same."

The statement of the contending parties shows on one hand the plaintiffs representing a trust estate that they are trying to save from loss by reason of their decedent, R. H. Ricks, endorsing for Dr. John R. Mercer and his wife, Mary S. Mercer, for borrowed money. On the other hand, by reason of this contract, the loss of the home to the widow of Dr. W. P. Mercer, Mary S. Mercer, and his children. Naturally the human element enters into the controversy. The duty of the plaintiffs, trustees for others, on the one hand, and the misfortune of

the widow and children on the other hand. The court below, presided over by a just and humane judge, is presumed to have taken all these matters into consideration, and found that the defendants had no *"meritorious defense."*

This Court, in *Farmers and Merchants Bank v. Duke, supra,* said: "It is the duty of the court below to find the facts, and his finding is ordinarily conclusive. Upon the facts found the conclusion of law only is reviewable."

The facts found by the court below in part are:

"Summons was issued 29 September, 1923, and verified complaint filed same day. Summons and copies of complaint were personally served upon the defendants Mary S. Mercer and Jno. R. Mercer on 1 October, 1923, and upon Margaret M. Tilghman on 8 October, 1923."

"That neither of the defendants above named at any time tendered any defense bond or affidavit and certificate in lieu thereof, made any motion to have the amount of bond fixed until after 30 October, 1923, and until more than twenty days had expired from the time of service of the summons and complaint on said defendants."

"That on 5 November, 1923, the first Monday in the first month after time for above-named defendants to file defense bond and answer had expired"—motion was made before the clerk to strike out the proposed answer and to give judgment by default final, etc., which was done.

On 14 November, 1923, defendants moved before the clerk to set said judgment aside, and upon his denial appealed to the judge of the Superior Court, and on 21 November, 1923, said defendants moved before the judge to set said judgment aside for mistake, surprise, or excusable neglect.

The court below held "that the judgment of the clerk appealed from was regularly rendered according to law," and "that said judgment was not taken by mistake, inadvertence, surprise, or excusable neglect."

The record shows the summons and copy of verified complaint was personally served on John R. Mercer on 1 October, 1923. Under the law, "the answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint," etc. (Public Laws, Extra Session 1921, ch. 92, sec. 1, subsec. 3.) Jno. R. Mercer did not tender his answer until 5 November, 1923. The plaintiff moved on 5 November, 1923, for judgment by default final against Jno. R. Mercer. This was allowed by the clerk and was proper. *Lerch v. McKinne,* 186 N. C., 244.

Ordinarily excusable neglect cannot arise out of a mistake of law. *Skinner v. Terry,* 107 N. C., 103; *Phifer v. Ins. Co.,* 123 N. C., 409; *Mann v. Hall,* 163 N. C., 51.

The plaintiff moved, on 5 November, 1923, for judgment by default final against Mary S. Mercer, T. C. and Margaret M. Tilghman, and that the proposed answers be stricken from the files. The clerk allowed this motion and rendered the following judgment: "That the proposed answers of Mary S. Mercer, T. C. Tilghman and Margaret M. Tilghman be stricken out for failure to file defense bond as required by C. S., 495, or to make proper showing for purpose of defending the action in *forma pauperis.*"

C. S., 495, is as follows: *"In all actions for the recovery or possession of real property the defendant, before he is permitted to plead, must execute and file* (italics ours), in the office of the clerk of the Superior Court of the county where the suit is pending, an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits."

The plaintiffs were diligent, they agreed to nothing and waived nothing; the Monday after the time had expired the motion was made in accordance with the statute. They were in their legal rights.

C. S., 595. *"By default final.*—Judgment by default final may be had on the failure of the defendant to answer." Subsection 4 is as follows: "In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering." This section must be construed with C. S., 495, and Public Laws, Extra Session 1921, ch. 92, sec. 1, subsec. 3, *supra.* Statutes in *pari materia* are to be construed together.

We do not mean by the position taken in this case to hold that the filing of the bond cannot, under certain circumstances, be waived, and when a case is in the Superior Court at term, that the judge does not ordinarily have discretion.

In *Dunn v. Marks,* 141 N. C., 232, it is said: "This is an action of ejectment. At November Term, 1905, the first term after service of summons, the defendant filed his answer, but failed to file his defense bond as required by Revisal, 453 (C. S., 495). No action was had at that term. At December term the plaintiff moved for judgment for want of a defense bond. The court in its discretion granted sixty days leave to file such bond. From this order and the refusal of judgment by default, the plaintiffs appealed. This is a motion to dismiss the appeal on the ground that this was a matter of discretion from which no appeal lay. The plaintiff, having made no objection to the failure

to file bond at the term at which the answer was filed, it is questionable if the judge ought to have given judgment at the subsequent term without giving the defendant some opportunity to file bond. *McMillan v. Baker,* 92 N. C., 110 (85 N. C., 291). Whether or not time should have been given to file bond was a matter in the discretion of the judge. Revisal, 512 (C. S., 536), provides: 'The judge may likewise *in his discretion,* and upon such terms as may be just, allow an answer or reply to be made, or *other act to be done,* after the time limited, or by an order enlarge such time.' This applies to filing the defense bond required by section 453 (C. S., 495). *Taylor v. Pope,* 106 N. C., 267."

C. S., 547, is as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it comformable thereto."

Public Laws, Extra Session 1921, ch. 92, sec. 1, subsec. 18, is as follows: "Nothing herein contained shall be construed to prevent the resident judge or the judge holding courts in any district from making such orders and decrees as are now provided in injunctions and other provisional and extraordinary remedies, or from extending the time to answer in all cases upon motion upon five days notice as to time and place, which are to be fixed by the judge; and the judge in his discretion may in term time allow amendment of pleadings on file, or allow the filing of any other pleadings in all cases transferred to the civil issue docket for trial."

It will be observed that while it was held in *Lerch v. McKinne,* 186 N. C., 245, "if the complaint is served with the summons as provided in the statute, the defendant shall have twenty days after such service in which to answer, and in such event the clerk has no authority to extend the time for filing an answer beyond twenty days after service of the complaint," this does not withdraw from the defendant the right to apply to the resident judge, or the judge holding the courts of the district, for an extension of time within which to file answer, upon five days notice being given as to the time and place when such motion will be made.

In *Cahoon v. Everton, ante,* 373, it was said: "The plaintiff having made no motion before the clerk for judgment by default on account

of the answer not being filed in time, and allowed the case to be transmitted for trial on the issues at term, waived his right and the fact that the answer was not filed before the clerk in time will be considered waived, under the facts and circumstances of this case. The court below treated it as filed in time and made the order as set out in the record."

McNair v. Yarboro, 186 N. C., 111, is in harmony with the position taken here. We do not think the case of *Shepherd v. Shepherd,* 179 N. C., 122, is in conflict. In that case *Brown, J.,* said: "An order of the Superior Court striking out an answer for want of a bond is reviewable where the defendant has been led to believe that the plaintiff has waived the bond. *McMillan v. Baker,* 85 N. C., 291 (92 N. C., 110), and cases cited in the opinion. In the case at bar the answer was filed at the same term with the complaint. No motion was made for an entire year, and then only when the case had been continued for the term, and on the last day of that term." The defense bond was allowed to be filed within a reasonable time.

In the instant case the plaintiffs waived no right, but stood strictly on their legal rights; there was no consent and no waiver but a demand for what was plainly written in the statutes. We cannot make the law, that is for the legislative branch of the Government. They have seen fit to establish a new procedure for the bringing of actions. It may work hardships, but we have no power to legislate. The statutes will have to be followed. Any change can only be made by consent of the parties or waiver, which implies consent and estops one from demanding strict compliance.

The caption of chapter 92, Extra Session 1921, *supra,* is as follows: "An act to amend chapter 156 of the Public Laws 1919, chapter 96 of the Public Laws, Extra Session 1920, and chapter 96 of the Public Laws 1921, *relating to civil procedure in regard to process and pleadings, and to expedite and reduce the cost of litigation* (italics ours), and to consolidate the various acts relating thereto."

It was necessary under the statute for Mrs. Margaret M. Tilghman to give bond. She claimed as a tenant in common. "A possession of one tenant in common is in law the possession of all his cotenants because they claim by one common right." *Black v. Lindsay,* 44 N. C., 467. See *Lester v. Harward,* 173 N. C., 85; *Gentry v. Gentry, ante,* 31.

The discretion of the trial judge as to findings of fact is well stated by *Stacy, J.,* in *S. v. Jackson,* 183 N. C., 698: "The findings of fact of a referee, approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N. C., 60; *Hudson v. Morton,* 162 N. C., 6; *Hunter v.*

Kelly, 92 N. C., 285. Likewise, where the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they afford no ground for exception on appeal unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or unless some other question of law is raised with respect to said findings. *Caldwell v. Robinson,* 179 N. C., 518; *Thompson v. Smith,* 156 N. C., 345; *Rhyne v. Love,* 98 N. C., 486. See, also, C. S., 579, and annotations thereunder." *Norton v. McLaurin,* 125 N. C., 187, and cases cited; *Farmers and Merchants Bank v. Duke, supra.* We think the court below had competent evidence upon which to support its findings of fact.

We have examined carefully the record, findings of fact, judgment and able briefs of counsel on both sides but can find no error. The judgment is, therefore,

Affirmed.

MRS. H. T. MILLER AND MRS. J. H. TRAVIS v. MRS. MARGARET ELLA MARRINER, STERLING MARRINER, LOUISE MARRINER AND LOUIS MARRINER, AND MRS. MARGARET ELLA MARRINER, GUARDIAN AD LITEM OF STERLING MARRINER, LOUISE MARRINER AND LOUIS MARRINER.

(Filed 19 March, 1924.)

1. Mortgages—Sales—Default.

Where the provisions of a mortgage so states, the mortgagee may make a valid sale of the lands described upon default in payment of either the principal of or interest on the note it secures, at the maturity of either.

2. Same—Estates—Husband and Wife—Tenancy by the Curtesy.

A surviving husband who has had issue born alive has a life estate in the lands of the wife as tenant by the curtesy, and where the same is subject to a mortgage she has made thereon, he is only required to pay the interest on this indebtedness from the income or rents thereof, and he is not trustee for the children who take in remainder, to the extent of requiring him otherwise to pay the interest, as it accrues.

3. Same—Purchasers—Fraud—Evidence.

The husband, as tenant by the curtesy in the lands of his deceased wife, subject to her mortgage, is not, as trustee for the children taking in remainder, required to pay the principal sum due under the terms of the mortgage, and where the land has been sold under the power in the mortgage, and he has acquired the same from the purchaser at the sale, acting as his agent, it is not alone evidence of such a procurement of the property as will invalidate his purchase for fraud.

THIS was a civil action tried before *Connor, J.,* and a jury, at July Term, 1923, of WASHINGTON. Appeal by plaintiffs.

L. C. Marriner died on 3 May, 1921. He was married three times. By his first wife, Jane Marriner, who died on 18 May, 1890, he had two children, the plaintiffs in this case. By his second wife he had a son, Cecil Marriner, and by his third wife, Margaret Ella Marriner, he left three children—Sterling, Louise, and Louis Marriner. His widow, Margaret Ella Marriner, and his children by his third marriage are defendants in this case. It is not known whether Cecil Marriner, the son by his second wife, is living or dead, and his whereabouts is unknown. He was not made a party to the action.

On 1 January, 1890, Jos. W. Blount and wife, Mary I. Blount, made a deed to Jane Marriner for what is now known as "The Marriner Hotel Property." The consideration stated in the deed was $259. On the same day the deed was made L. C. Marriner and his wife, Jane Marriner, executed a mortgage to Jos. W. Blount, "For that, whereas, the said Jane Marriner is indebted to the said Jos. W. Blount in the sum of $259, for which said Jane Marriner has executed and delivered to the said Jos. W. Blount, as aforesaid, her bond of even date with this deed in said sum of $259, payable one, two, and three years after date, with interest thereon from date until paid, at the rate of 8 per centum per annum, payable on 1 January, 1891, and January, 1892, and January, 1893, hereafter, and it has been agreed that the payment of said debt shall be secured by the conveyance of the land hereinafter described."

Both deed and mortgage were at once recorded in Washington County.

On 9 January, 1893, Jos. W. Blount sold the land under the terms of his mortgage at the county courthouse door, and W. H. Fitchett became the last and highest bidder in the sum of $321. The same day W. H. Fitchett made a deed to L. C. Marriner; consideration, $321. These deeds were at once recorded (12 January, 1893). L. C. Marriner willed the property to his widow and children, the defendants in this action.

The plaintiffs bring this action and allege that their father, L. C. Marriner, "subsequent to the death of the said Mrs. Jane Marriner, to wit, on 9 January, 1893, having failed to pay or discharge the interest due upon the said mortgage debt, as plaintiffs are informed, believe and so aver, as he was in duty bound to do; and further, having failed to discharge said mortgage debt in toto as administrator of his deceased wife, the said Mrs. Jane Marriner, notwithstanding, as plaintiffs are informed, believe and aver, he was entitled to letters of administration upon her said estate, and notwithstanding further, as aforesaid, that the said Mrs. Jane Marriner died seized and possessed of property other

than that above described of value more than sufficient to discharge said mortgage debt, did, either for the purpose of subsequently holding said property in trust for himself and the plaintiffs, according to their respective interests of life tenant and remaindermen, or else with the design to defraud the plaintiffs of their interest as remaindermen, cause or procure said property to be sold under and by virtue of the provisions of the said mortgage; and did further, at said sale, purchase said property through the medium of one W. H. Fitchett, his agent," etc. Plaintiffs further claim that they were "in ignorance of the existence of the said mortgage and the sale thereunder whereby defendants claim title in fee inured to the said L. C. Marriner until after the death of the said L. C. Marriner and the production of said paper-writing alleged, as aforesaid, to be his last will and testament."

The plaintiffs pray "that the said L. C. Marriner may be adjudged to have held said property in trust for the plaintiffs after the expiration of his life estate, and that the defendants, if the said paper-writing alleged to be the last will and testament of said L. C. Marriner be valid, be adjudged to hold the said property as trustees for the plaintiffs; that plaintiffs be adjudged to own the said property in fee," etc.

Mrs. Margaret Ella Marriner, the widow, and as guardian *ad litem* for her children, answers and says: "It is denied that Mrs. Jane Marriner ever held any title or interest in the property known as the hotel property except the mere naked legal title, all the beneficial interest having at all times been in the said L. C. Marriner. These defendants are informed, and so aver, that Mrs. Jane Marriner was possessed of no estate and owned no property and paid no consideration for any conveyance made to her, and particularly paid none for the conveyance made to her, recorded in Book 30, page 34, but that all of said consideration was paid by the said L. C. Marriner, and Mrs. Jane Marriner held at most the legal title only for the benefit of the said L. C. Marriner. . . . That on or about 9 January, 1893, this property described in said mortgage was advertised and sold, at which time and place, as they are informed and believe, when W. H. Fitchett purchased the same. These defendants further aver that thereafter the said Fitchett, for valuable consideration, conveyed the said property described in said deeds to the said L. C. Marriner. . . . And these defendants specifically deny any fraud on the part of the said L. C. Marriner or said Fitchett or any one else connected with said sale."

The defendants further answer and say: "That for more than twenty years, and for more than twenty-one years prior to his death, the said L. C. Marriner was in open, notorious, adverse, exclusive and continuous occupancy over the premises referred to in the complaint, exer-

cising sole dominion of the same and using the same as his own, paying all taxes and making all use of the said property. That he built the hotel upon the same and placed all other improvements upon the said property which had theretofore been but a vacant lot. That if the plaintiffs ever had any cause of action against the defendants or against L. C. Marriner, under whom the defendants claim, which these defendants deny, the same arose more than twenty years prior to the bringing of this action, and these defendants especially plead the said lapse of time and the twenty-one-year statute of limitations in bar of the assertion of said claim."

Defendants plead the three, seven and ten years statute of limitations. They further say: "These defendants aver that the said claim of the plaintiffs, if any they ever had, being equitable in its nature, is a stale claim, and these defendants aver that the plaintiffs have slept upon their rights; and these defendants especially plead the laches of the plaintiffs, independent of any statute of limitations, in bar of the assertion of any such claim as set out in the complaint at this late day, and insist that this court of equity, by reason of said laches, should not permit the plaintiffs now to assert an equity which they must assert to entitle them to relief and which could have been asserted at any time for years past, when the defendants and those under whom they claim would have been in position to meet the same, and that to permit the assertion of the claim at this time would be to place the defendants at a great disadvantage."

The following issues were submitted to the jury, and their answers thereto:

"1. Was Mrs. Jane Marriner, at the time of her death in May, 1920, the owner in fee of the property in controversy, subject to the Blount mortgage, as alleged in the complaint? Answer: Yes.

"2. What amount was due upon said mortgage on 9 January, 1893? Answer: $321.73.

"3. What was the fair market value of said property on said date? Answer: $321.73.

"4. Did W. H. Fitchett bid in said property, at a sale under said mortgage, for and on behalf of L. C. Marriner, the life tenant, and take a deed therefor, as alleged in the complaint? Answer: No.

"5. Did L. C. Marriner cause or procure said sale to be made? Answer: No.

"6. Did said Marriner acquire said lands through Fitchett, in fraud of the rights of the plaintiffs, as alleged in the complaint? Answer: No.

"7. What was the usual rental of said property during years 1921, 1922, and 1923? No answer.

"8. Is plaintiffs' cause of action barred by the statute of limitations, as alleged in the answer? No answer.

"9. Is plaintiffs' cause of action barred by the plaintiffs' laches, as alleged in the answer? No answer."

The court below, on the verdict, gave judgment "that plaintiffs take nothing by their action and that defendants go without day," etc.

The plaintiffs assigned errors: the refusal of special prayers for instruction, the charge as given in certain particulars, the judgment of the court below, and appealed to this Court. The material assignments of error will be considered in the opinion.

W. L. Whitley, Vann & Holland, and Meekins & McMullan for plaintiffs.

Van B. Martin and Ehringhaus & Hall for defendants.

CLARKSON, J. The fifth issue submitted to the jury was as follows: "Did L. C. Marriner cause or procure said sale to be made?" To this issue the jury answered "No." Upon this issue the plaintiffs in apt time requested the court to charge the jury as follows: "If you believe the evidence and find the facts to be as testified, you will answer the fifth issue 'Yes.'" And in the event the court refused to give this instruction, the plaintiffs requested the court to charge further upon this issue as follows: "The court charges you that, if you find by the greater weight of evidence that said mortgage sale was procured by Marriner, that is to say, that it was made at Marriner's instance or request; or if, by the greater weight of evidence, you find that the said sale was wholly or partially induced by Marriner's failure, while enjoying a life estate in said property, to pay the interest upon the Blount mortgage accruing after his said wife's death, then, in either of these events, I charge you to answer the fifth issue 'Yes.'" The court refused to give either of these instructions, as requested, and in lieu thereof charged the jury upon the fifth issue as follows: "I instruct you again that unless you find, by the greater weight of the evidence, that Mr. Marriner actively besought and requested Mr. Blount to advertise and sell this property under the mortgage, and that Mr. Blount did advertise and make a sale, at the request of Mr. Marriner, you should answer the issue 'No.'"

The refusal to give the prayers asked for and the charge as given is plaintiffs' first, fourth and fifth assignments of error.

The indebtedness recited in the mortgage made by L. C. Marriner and Jane Marriner, 1 January, 1890, to Jos. W. Blount was as follows: "For that, whereas, the said Jane Marriner is indebted to the said Jos. W. Blount in the sum of $259, for which said Jane Marriner has

executed and delivered to the said Jos. W. Blount, as aforesaid, her bond of even date with this deed in said sum of $259, payable one, two, and three years after date, with interest thereon from date until paid at the rate of 8 per centum per annum, payable on 1 January, 1891, and January, 1892, and January, 1893, hereafter, and it has been agreed that the payment of said debt shall be secured by the conveyance of the land hereinafter described."

The power of sale was as follows: "If the said Jane Marriner shall fail or neglect to pay the interest on said bond as the same may hereafter become due, or both principal and interest at the maturity of the bond, or any part of either, then, on application of said Jos. W. Blount, his assigns or other persons who may be entitled to the moneys due thereon, it shall be lawful for and the duty of the said Jos. W. Blount to advertise," etc.

Jane Marriner died 18 May, 1890, and the land was sold at public auction to the highest bidder under the terms of the mortgage on 9 January, 1893. It was purchased by W. H. Fitchett for $321, who in turn, on the same day and at the same price, deeded it to L. C. Marriner. Jos. W. Blount had the right to sell under his mortgage. The one-third of the principal of the debt was due 1 January, 1891, and one-third 1 January, 1892. Two payments of principal were past due.

"Where a note is payable three years after date, but the interest is payable semiannually, and a mortgage, given to secure the note, subjects the land to sale upon default of payment of principal or interest, or any part of either at maturity, and the debtor fails to pay interest when due, according to the conditions of the mortgage both principal and interest become due, and the creditor is entitled to foreclosure." *Gore v. Davis,* 124 N. C., 234. See, also, *Eubanks v. Becton,* 158 N. C., 233.

The question of grossly inadequate price, the deflated times and the testimony of P. L. Rea were questions of fact, not for us to determine, but the jury, on the issue. But the plaintiffs contend: "This instruction should also, it is submitted, have been given for another reason. Under the language of this issue plaintiffs were entitled to a favorable answer if Marriner either caused or procured said sale to be made. And while the word 'procure' may imply an active solicitation or responsibility, the word 'cause,' it is submitted, has a broader meaning and signifies not only procurement by Marriner, but also any neglect or default on his part inducing the making of said sale."

We do not understand that our authorities go as far as the contention made by plaintiff. On the death of Jane Marriner, her husband, L. C. Marriner, having had children by her, became tenant by the curtesy, and entitled to a life estate in the land. L. C. Marriner lived on the land.

Chief Justice Ruffin, in *Jones v. Sherrard,* 22 N. C., 187, says: "In the first place, it is to be observed that the terre-tenant of land, liable to encumbrance, must take care that such encumbrance does not accumulate to the injury of those who are to come after him. But then, in doing this, he is not bound to give anything for the relief of the land but what is derived from the land. Therefore one who is liable in respect of the occupation of land cannot be called on for more than the rents or actual annual value of the premises during his time. To that extent it is clear a tenant for life *must keep down the interest on encumbrances* (italics ours), and the reversioner may file a bill to make the rents amenable, and a receiver will be put upon the tenant for that purpose."

2 Story's Equity Jurisprudence (14 ed.), sec. 658, in part, is as follows:

"*Duty of Life Tenant to Pay Interest on Mortgage Debt.*—In regard to the interest due upon mortgages and other encumbrances the question often arises, by whom and in what manner it is to be paid. And here the general rule is that a tenant for life of an equity of redemption is bound to keep down and pay the interest, although he is under no obligation to pay off the principal."

Admitting that Marriner had to pay the interest, two defaults of the principal had occurred—the first and second payments of January, 1891 and 1892. These defaults of payments, by clear intent and language, gave the power of sale on 1 January, 1891, on failure to pay principal and interest or either, and like power on 1 January, 1892 and 1893. Although the sale took place on 9 January, 1893, it was legally sold under default for nonpayment of principal on 1 January, 1891 and 1892.

The issue itself was "cause or procure." The words are those frequently in common use, their meaning well understood. We do not think that in law the fact that the life tenant did not pay the principal, it could be imputed to him that he "caused" the land to be sold under our decisions.

The court below used language as strong as plaintiffs were entitled to—"actively besought and requested Jos. W. Blount to advertise and sell this property under the mortgage." The contentions on each side were given by the court, and it was a question for the jury.

Assignments of error 2, 6 and 7 relate to the sixth issue, as follows:

"Did said Marriner acquire said lands from Fitchett in fraud of the rights of the plaintiffs, as alleged in the complaint?" Upon this issue plaintiffs requested the court to charge the jury as follows: "If you believe the evidence and find the facts to be as testified, you will answer

the sixth issue 'Yes.'" And the court's refusal to give this instruction constitutes plaintiffs' second assignment of error.

We think there was sufficient evidence on this issue to be submitted to the jury.

The sixth and seventh assignments of error are to the charge on the sixth issue. We give the contention and charge in full:

"The plaintiffs contend you should find as a fact from this evidence that Marriner did acquire this land through Mr. Fitchett, and that he acquired it at a price grossly inadequate when compared to the real value of the property; that you should find at the time he sold, these plaintiffs as heirs at law of Jane Marriner were the owners in fee simple of this land, subject first to the Blount mortgage, and second to the life estate of L. C. Marriner, and that the fact of this sale and of the acquisition by Marriner of the title to the land through Fitchett was to deprive these plaintiffs of this property and put it in L. C. Marriner. Plaintiffs say if you find that was the effect of what you find that Mr. Marriner did, to take this property from those who owned it after his death and put the title in him, and that he did this for that purpose, taking advantage of his relationship as father of these plaintiffs, taking advantage of the fact that they were then minors, being fourteen and seven years of age, respectively, taking into consideration the fact that he acquired it for just the amount of the mortgage debt, one-tenth of the real value, as plaintiffs contend, that that ought to satisfy you that Marriner acquired this property with a fraudulent purpose, and that the effect of his conduct was to commit a fraud on the rights of the plaintiffs, and that therefore you should answer the issue 'Yes.' Defendant, on the other hand, contends that you should find that at the time of this conveyance Mr. Marriner and his wife, Mrs. Jane Marriner, were living together with two or more children, it being some evidence that the other children have since died without issue. That for some purpose, which on account of the lapse of time the defendants are unable to show, when Mr. Marriner bought this property he had deed made to his wife; that the deed was made in January, 1890, and not recorded until 10 March, 1890; that you should find that at the time this deed was executed and about the time it was being put on record a house was being built on the land, a large house being built for the use to which it was afterwards put, that is, a public hotel; that you should find that within a short time after this deed was put on record, to wit, in May after March, when it was recorded, Mrs. Jane Marriner died; that you should find that she left Mr. Marriner with two young children to support, and that you should find that Mrs. Marriner had never paid anything for this property, but that in order to carry out some understanding or some arrangement which

Mr. Marriner had, the property was conveyed to her; that subsequently when the mortgage which had been given to secure the purchase price, as defendants contend, became due, in order to be able to handle this property advantageously to himself and to his family, Mr. Marriner bought this property in from Mr. Fitchett and had the deed made to himself. The defendants contend that when you find, as they insist that you should find, that Mrs. Marriner, the mother of the plaintiffs, had never paid anything for this property, as they contend that you should find, that it was no fraud upon her or her heirs for her husband to purchase this property in this manner; that this evidence shows that he did purchase it, and that therefore you should answer this issue 'No.' The defendants contend that although you may find that by reason of his changed relationship in life many, many years after these transactions he devised this property to the defendants, that that is no evidence that at the time he acquired the title through Fitchett that he did so in fraud of the plaintiffs; that you should find that subsequent to this transaction, after his wife had died and these two ladies grew up and married, that Mr. Marriner himself married a second time and then the third time, and that three children were born to him of his third marriage; that then, realizing that the children by his first wife were given twenty acres of land which had been deeded to her, and realizing his obligations to his wife, who is now his widow, and his minor children, that he devised his hotel property to her, and that that is no evidence that he had a fraudulent purpose at the time. So defendants say that you should answer that issue 'No.'" The jury answered the sixth issue "No."

We see no error in this charge. It was a question of fact whether L. C. Marriner acquired the land through fraud. The jury answered "No." It was not a matter of law to be decided by the court.

It seems to be settled that ordinarily a life tenant must pay the taxes and the interest on a mortgage indebtedness, to the extent, at least, of the income which he receives from the property, but he is not bound to pay the principal of the mortgage. Being bound to pay the taxes and interest, he cannot acquire a tax title or good title based on his failing to pay taxes or interest. He is a trustee to this extent. If a sale is made by a person who holds a mortgage *to pay the principal of the mortgage,* and the life tenant purchases it, it is a question of good faith and whether the life tenant fraudulently caused, procured or took advantage of the sale to the prejudice of the rights of the remaindermen. The decisions are in contrariety, but we think the position here taken consonant with justice and fair dealing. In the instant case this was an issue of fact for the jury, and not a question of law.

The fourth issue is: "Did W. H. Fitchett bid in said property, at

a sale under said mortgage, for and on behalf of L. C. Marriner, the life tenant, and take a deed therefor, as alleged in the complaint?"

The third assignment of error is the refusal to charge as requested on the fourth issue. The court below gave the contentions on this issue and charged as follows: "I instruct you, gentlemen of the jury, that unless you find by the greater weight of the evidence in this case that prior to the sale, or contemporaneously with the sale, there was an agreement between Fitchett and Marriner by which Fitchett was to bid the property off, not for himself but for Marriner, you would answer this issue 'No.' If, however, you find from the evidence, by its greater weight, that there was an agreement between Fitchett and Marriner entered into before the sale or while the sale was going on, that Fitchett would purchase for Marriner, then you would answer this issue 'Yes,' but if you do not so find then you would answer the issue 'No.'"

We think there was no error in the refusal to charge as requested and the charge as given on this issue.

The other exceptions are merely formal and are covered in the positions taken in this opinion.

From the record it appears that, having purchased from Fitchett, L. C. Marriner continued to occupy said property, using and claiming it as his own from said date (9 January, 1893) until his death (3 May, 1921), a period of twenty-eight years. The deed to the property was at once put on the records of the county. His own acts, making improvements and recorded deed, were some evidence of actual notice of the nature of his claim during this period.

One of the plaintiffs, Mrs. Miller, has lived near the property at Edenton ever since her marriage. Although the plaintiffs were but fourteen and seven years of age when their mother died, Mrs. Miller, one of the plaintiffs, was seventeen years old at the time of sale, and Mrs. Travis was ten.

It appears from the testimony that plaintiffs delayed the bringing of this suit, charging their father with fraud:

Until after his death.

Until after the death of Blount, the mortgagee, who sold.

Until after the death of Fitchett, who purchased at mortgage sale and afterwards conveyed to Marriner.

Until after the death of the witnesses by whom the *bona fides* of the transaction could be proven.

The suit was not brought:

For twenty-eight years and seven months after sale.

For twenty-five years after plaintiff, Mrs. Miller, came of age.

For eighteen years after the other plaintiff, Mrs. Travis, came of age.

To the complaint the defendants interpose a general denial, and also plead the statute of limitations and the equitable plea of laches.

Mrs. Miller testified: "I knew for the first time there was a mortgage made by my mother on this property to Mr. Blount after my father's death."

We do not think it necessary to discuss the statutes of limitation or the equitable plea of laches from the findings of the jury.

As a matter of interest, we may call attention to what was well said by *Connor, J.,* in *Sprinkle v. Holton,* 146 N. C., 266: "The security of property rights, the peace of families and the public welfare demand that there must be an end of litigation. Courts of equity have always wisely refused to entertain 'stale claims.' "

From a careful examination of the entire case we can find

No error.

R. E. HERRING v. H. B. IPOCK AND J. A. VINSON.

(Filed 19 March, 1924.)

1. Partnership—Evidence—Deceased Persons—Statutes.

Where the liability of the defendant depends upon whether he was a partner in a firm at the time a debt was contracted by defendant firm, the fact at issue may be proved by the plaintiff either by direct or circumstantial evidence.

2. Same—Interest—Transactions and Communications.

Where defendant's liability depends upon whether he was a member of defendant partnership at the time the firm contracted a debt with the plaintiff, the subject of the action, who has since died and his administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of C. S., 1795, as to the payment to his own knowledge by deceased of the partnership debts.

3. Same—Questions for Jury—Trials.

Where the deceased defendant is sought in an action to be held liable as a partner of a firm, for the debts of the firm, a lumber manufacturing concern, and there is evidence tending to show he had frequently paid its debts in the course of its operation, a disinterested witness may testify that the firm would dress his lumber as a partner, and whereas to a single transaction he has stated that he thought certain of his lumber was thus dressed, it leaves the weight and credibility of his evidence thereon to the jury.

4. Same—Opening the Door for Defendant's Evidence.

Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify

in plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and C. S., 1795, prohibiting testimony as to transactions, etc., with a deceased person, does not apply.

THIS was a civil action tried before *Grady, J.*, at October Term, 1923, of SAMPSON. Appeal by J. T. Vinson, executor of J. A. Vinson, deceased, defendant.

The plaintiff sued H. B. Ipock and J. A. Vinson, alleging that they composed the firm of the H. B. Ipock Company, for the sum of $1,165, on an open unsecured account for pine lumber. The defendant H. B. Ipock filed no answer but the defendant J. A. Vinson did file answer, denying that he was a member of the H. B. Ipock Company and also denying that he had any part in the purchase of said lumber, and was in nowise responsible for said indebtedness. During the pendency of the action J. A. Vinson died, and at the time of the trial his executor, J. T. Vinson, was duly made a party to the suit, and filed answer denying the plaintiff's claims.

The following issues were submitted to the jury, and their answers to same:

"1. At the time of the sale of the lumber from R. E. Herring to H. B. Ipock Co., was J. A. Vinson a member of said firm and a co-partner with Ipock? Answer: Yes.

"2. In what amount is H. B. Ipock Co. indebted to plaintiff? Answer: $1,165 and interest."

Judgment was rendered for plaintiff against defendants. J. T. Vinson, executor of J. A. Vinson, deceased, assigned errors and appealed to this Court. The exceptions and assignments of error will be considered in the opinion.

Fowler, Crumpler & Butler, and Faircloth & Fisher for plaintiff.

Butler & Herring, Jas. H. Pou, and J. R. Williams for defendant Vinson.

CLARKSON, J.. The first assignment of error is to the court below permitting the witness G. A. Waller to answer the following question in the following manner:

"Q. Did you, during the time that you were connected with the H. B. Ipock Company, did you and Mr. Ipock or Mr. Ipock in your presence ever draw any draft upon Mr. J. A. Vinson with which to meet your pay roll or to pay for hay or anything or other items connected with the business down here? Answer: I think so. I think he made all drafts on Mr. Vinson for expense accounts."

The controversy in this case is the *sole fact,* was J. A. Vinson a partner in the firm of H. B. Ipock Company. This fact can be proved by direct or circumstantial evidence. J. A. Vinson is dead and J. T. Vinson is the executor of his estate.

C. S., 1795, is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

Exclusion does not apply when witness has no interest in the result of the action. The interest which disqualifies one from testifying under C. S., 1795, *supra,* is a direct, legal or pecuniary interest in the event of the action. *Helsabeck v. Doub,* 167 N. C., 205; *In re Gorham,* 177 N. C., 275.

The witness Waller was not "interested in the event." He said, "I was not a member of the H. B. Ipock Company." His testimony was competent.

The next objection was to the question, "It asks for the contents of a draft which was in writing, and the draft itself was not produced or its absence accounted for." The drafts about which Waller was speaking, the question as asked, "In your presence ever draw any draft?" the answer was, "I think so," etc. The answer seems to imply knowledge, and its uncertainty could not be prejudicial. It was collateral to the issue and competent.

Davis, J., said, in *S. v. Ferguson,* 107 N. C., 846: "There are numerous exceptions to the general rule which requires the production of a written instrument as the best and usually only evidence of its contents. Does the note in question fall within any of the exceptions? The note contains no agreement required to be in writing; its contents were purely collateral to the issue, and, as was said by the present *Chief Justice* (Merrimon) in the case of *S. v. Credle,* 91 N. C., 648: 'It was not intended to be preserved, but to serve a temporary purpose and disappear. . . . It was a loose, casual paper, and what it con-

tained might be proved like any other fact or event. The rule that a written instrument cannot be contradicted, modified or added to by parol proof has no application to it. It was competent to speak of it and what it contained, without producing it or showing that it was destroyed or lost.' We do not think that the note in question comes within the general rule excluding parol evidence of the contents of written instruments, and the evidence should have been admitted. *S. v. Credle, supra; S. v. Wilkerson,* 98 N. C., 696; 1 Greenleaf Ev., sec. 89, and cases cited." See *Ledford v. Emerson,* 138 N. C., 502; *Andrews v. Grimes,* 148 N. C., 437; *Rabon v. R. R.,* 149 N. C., 59.

The next assignment of error was that the court below was in error in permitting the witness C. W. Petty to testify as follows:

"Q. What lumber was he speaking of at that time (referring to lumber which the witness had stated that J. A. Vinson had him to dress)? A. I suppose it was his own lumber."

We think this evidence competent. The witness Petty had just previously testified that he had dressed all the lumber for the H. B. Ipock Lumber Company, and that J. A. Vinson would come down occasionally and go over the lumber yard and inquire how the H. B. Ipock Lumber Company was getting along, and questions like that. The question and answer, about which the defendant complained, shows the witness' best impression as to the ownership of the lumber of which Vinson was speaking at the time, and from the previous testimony of the witness it would seem that the impression was well founded, and might have been testified to by the witness as a positive fact.

The last assignments of error were to the testimony of the defendant H. B. Ipock, as follows:

"Q. Were you returning his money at 6 per cent interest? Answer: Yes, sir.

"Q. Well, was he to share in the profits that the business might make over and above that interest? Answer: Yes.

"Q. What part of the profits was he to get over and above the 6 per cent, and what part of this profits were you to get out of this business down here? Answer: Fifty per cent.

"Q. State whether he said anything to you about not wanting his name used in the business down here, about not wanting his name known in same. Answer: Well, when I decided that I wanted to go into this business I took the matter up with Mr. Vinson as to buying out Vinson, Jones & Finch lumber business, and before I did that we talked it over with regard to buying it out. We went to the banks down here."

It will be noted that the witness H. B. Ipock was offered by the plaintiff for the purpose of identifying letters obtained from the Ipock-

Vinson file, which identification was made without objection; was, on cross-examination, asked by the attorney for J. T. Vinson, executor of J. A. Vinson, deceased, to explain various and sundry transactions between him and J. A. Vinson relative to the manner in which the H. B. Ipock Company was conducted, and how and from whom the money was obtained for the conduct of the said business. Whereupon the witness proceeded at some length, detailing his financial connections with J. A. Vinson. Upon cross-examination the witness had been asked from whom did he obtain the money to conduct the H. B. Ipock Lumber Company, and how much had he thus obtained, and upon redirect examination he was asked upon what terms and conditions did he obtain it.

The defendant J. T. Vinson, executor of J. A. Vinson, contends that this evidence was incompetent; that the defendant Ipock was testifying in his own interest and against him as executor of J. A. Vinson, deceased, the defendant in this action, as to a "personal transaction" between them, which is not permitted by the statute, C. S., 1795, *supra.*

The plaintiff, on the other hand, contends that although J. A. Vinson is dead, that J. T. Vinson is his executor, representing the estate. That when a personal representative "opens the door" by testifying to a transaction, etc., it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may "come in."

From a careful review of the authorities, we think the plaintiff's contention correct, and the court below made no error in permitting the testimony. *Cheatham v. Bobbitt,* 118 N. C., 343; *Sumner v. Candler,* 92 N. C., 635; *Hawkins v. Carpenter,* 85 N. C., 482; *Pope v. Pope,* 176 N. C., 287.

In the *Cheatham case, supra,* the suit was brought by B. F. Cheatham, administrator of Jno. A. Cheatham, against Wm. A. Bobbitt. The plaintiff, B. F. Cheatham, administrator, was a witness and testified that the defendant, Wm. A. Bobbitt, *"purchased goods and merchandise"* from Jno. A. Cheatham, plaintiff's intestate. The defendant, Wm. A. Bobbitt, was allowed to testify as to the whole transaction and the agreement between them in reference to the purchase of the goods and merchandise. The plaintiff having "opened the door," the defendant was allowed to "walk in." But it must be in the "same door," transaction or communication on which the witness had testified.

From a careful review of the record we can find

No error.

DUNCAN CAMPBELL v. W. D. HALL ET AL., TRUSTEES OF THE CHURCH OF THE COVENANT.

(Filed 26 March, 1924.)

Liens—Statutes—Subcontractors—Materialmen—Notice to Owner—Actions.

Where the subcontractor and material furnisher for the erection of a building have given the owner an itemized statement of materials furnished by them therefor, and at that time the owner owes the contractor moneys under the contract made with him, to that extent the subcontractors and materialmen have a lien for the payment of their claims so filed, and may maintain a civil action thereon against the owner under the provisions of C. S., 2439, 2440, 2441, without being required to file their liens within six months, etc., under the provisions of C. S., 2469, or bring suit within six months thereafter, under those of C. S., 2474.

APPEAL by defendants from *Daniels, J.*, at February Term, 1924, of WAKE.

The case was heard upon the following agreed statement of facts:

1. Prior to 15 May, 1922, the Church of the Covenant contracted with U. A. Underwood for the building of certain Sunday-school rooms in the city of Wilmington, N. C., to be constructed according to certain specifications and for a specified sum.

2. Prior to the said 15 May, 1922, the said U. A. Underwood subcontracted to the plaintiff, Duncan Campbell, a certain part of said work, to be constructed according to the said specifications and for a specified sum.

3. On or about 15 May, 1922, the said Duncan Campbell notified the defendant, Church of the Covenant, that the said U. A. Underwood was indebted to him on his said subcontract in the sum of $1,250, and that he would require the Church of the Covenant to pay to him that sum from the moneys due by said church to U. A. Underwood.

4. Thereafter the plaintiff herein instituted suit against U. A. Underwood in the Superior Court of Wake County and recovered judgment against him on his said subcontract for the sum of $1,250, with interest and cost. In the said action the defendant therein, U. A. Underwood, set up a counterclaim against the said Duncan Campbell, which is substantially the same as the counterclaim set up by the defendants in this action, and a verdict was found against the said U. A. Underwood on the said counterclaim.

5. Subsequently, but more than six months after the giving of the notice by the said subcontractor, Duncan Campbell, to the owners, defendants herein, this action was brought by the said Duncan Campbell against the said Church of the Covenant.

6. At the time of giving said notice, the Church of the Covenant was indebted to U. A. Underwood upon his said contract in a sum exceeding $1,250.

7. U. A. Underwood completed the said contract with the Church of the Covenant, and delivered the said buildings in accordance with the terms of his contract and at the contract price.

8. U. A. Underwood is now insolvent, but the said Church of the Covenant required the said U. A. Underwood to furnish to the said church an indemnity bond to indemnify the said church against the claim of the plaintiff, which bond was given with the Maryland Casualty Company as surety thereon, and which bond the defendants now hold.

Upon these facts, *Judge Daniels* rendered the following judgment:

"It appearing to the court that the only defense insisted on by the defendant, Church of the Covenant, is that the suit to enforce the claim was not brought within six months after notice to the church of the plaintiff's claim, and the court being of the opinion that under the statute, where a lien is not filed, but notice is required to the owner to withhold the fund, the suit is not required to be brought within six months after giving said notice:

"It is therefore ordered and adjudged that the plaintiff, Duncan Campbell, recover of the defendant, Church of the Covenant, the sum of $1,250, the amount of its claim, with interest thereon from 15 May, 1922, and his cost incurred in this action, to be taxed by the clerk."

The defendants excepted and appealed. The only question is whether it was necessary for the plaintiff to bring suit within six months after filing notice of his claim with the defendants.

H. L. Swain and Johnson & McMahon for plaintiff.
Rountree & Carr for defendants.

ADAMS, J. In *Hildebrand v. Vanderbilt,* 147 N. C., 639, it is said: "By virtue of Revisal, 2028 (C. S., 2470), the lien of a laborer or materialman must be filed in twelve months [now six], but by Revisal, 2022 (C. S., 2441) it can be acquired without filing if a statement of the amount due is rendered the owner. However acquired, the lien is lost if action thereon is not begun in six months. Revisal, 2027, 2023 (C. S., 2474, 2479). The plaintiff, not having begun this action within six months after giving the statement of his claim to the owner on 1 October, 1900, has no lien, but he can maintain this action against the owner personally, under Revisal, 2021 (C. S., 2439, 2440), which makes it the "duty of the owner to retain from the money thus due the contractor a sum not exceeding the price contracted for," to be paid to the laborer, mechanic, or materialman whenever an itemized statement

of the amount due him is furnished by either of such parties or the contractor." See, also, C. S., 2441.

Section 2469 of the Consolidated Statutes prescribes the method of filing a lien against both personal property and real estate, it designates the court in which the lien shall be filed, and requires a statement in detail of the materials furnished or the labor performed. Section 2470 provides that notice of the lien shall be filed at any time within six months after the completion of the labor or the final furnishing of the materials. For the enforcement of the lien referred to in these sections the claimant must bring his action within six months after notice of the lien is filed. C. S., 2474. But by virtue of section 2441 if an itemized statement be rendered to the owner as provided in the preceding section, the sum due the laborer or the person furnishing materials shall be a lien, although his claim is not filed with the clerk or with the nearest justice of the peace, under section 2469. So, when sections 2439, 2440, and 2441 are complied with, the claimant is not restricted to a period of six months for bringing his action. These sections do not create a technical lien, but they confer a right to have an accounting in a civil action, and a judgment for the amount found to be due by the owner to the contractor. *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 706; *Mfg. Co. v. Andrews,* 165 N. C., 285, 294; *Hardware Co. v. Graded Schools,* 151 N. C., 507; *Perry v. Swanner,* 150 N. C., 141.

The defendants have cited *Granite Co. v. Bank,* 172 N. C., 354, and *Norfleet v. Cotton Factory,* 172 N. C., 833; but, as we understand them, these cases are not in conflict with the construction given the various statutes referred to in *Hildebrand v. Vanderbilt* and *Foundry Co. v. Aluminum Co., supra.*

As the plaintiff's action may not be defeated by his failure to bring suit against the defendants within six months after giving notice to the defendants, the judgment, we think, is free from error.

No error.

STATE v. NATHANIEL GREEN.

(Filed 26 March, 1924.)

1. Evidence—Witnesses—Voluntary Statements—Motions—Appeal and Error—Objections and Exceptions.

Incompetent evidence, voluntarily given by a witness and not elicited by the question asked him, should be stricken out, on motion of the objecting party, but his mere exception is insufficient.

2. Same—Intoxicating Liquor—Harmless Error.

There was evidence, upon the trial for illicit distilling, that upon information received the officers of the law discovered the defendant engaged in the unlawful manufacture of whiskey: *Held*, evidence of how the officers made this discovery, if erroneously admitted, was harmless error.

3. Evidence—Character—Intoxicating Liquor.

Where a witness to the character of another of defendant's witnesses, upon trial for violation of the prohibition law, has testified that the witness's character was good, as far as he knew, it is not reversible error to defendant's prejudice for him to add that he did not think it bad character to buy a little whiskey, under an admission that the one concerning whose character he was testifying had gone into the woods with another for that purpose.

4. Evidence—Witnesses—Interest—Instructions.

An instruction, upon the trial of defendant, for unlawfully manufacturing whiskey, when he and his relatives had testified in his behalf, that they should receive their testimony with caution and scrutiny, but if the jury were satisfied that they were telling the truth, it would be their duty to give it the same credit as that of disinterested witnesses, is not objectionable.

APPEAL by defendant from *Cranmer, J.*, at October Term, 1923, of BRUNSWICK.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John D. Bellamy & Sons for defendant.

CLARK, C. J. The defendant was convicted of manufacturing liquor, or aiding and abetting in such manufacture. The evidence showed that the defendant was actively engaged in the manufacture of liquor at the time the officers saw him at a distillery, pursued him, and captured him. The distillery had just been fired up, it was full of mash, and the worm had been connected up. The defendant was the only person present at the time the officer came up within thirty steps of him. He ran, and the officer ran after him and caught him. The defendant's clothing showed that he had been operating the still, he having smut all over his trousers and shirt, and beer or mash upon his trousers. He told one of the officers that he was operating the still when they caught him, and, when carried before the justice of the peace and asked whether he were guilty, or not, said he was.

Another officer testified that he had found another still, at which he had arrested an old negro, named Jim McLean, about a quarter or half a mile from where they found the defendant. The witness said: "Jim pointed out the direction where we could find the defendant and his still."

The defendant objected to this testimony, which was overruled, and he excepted. There are two reasons why the admission of this statement is not reversible error. First, it was a voluntary statement by the witness, and the only way to take advantage of the error was to move to strike out the testimony and to except to the ruling if this was refused. Instead of doing this, the defendant's counsel contented himself with a simple objection. Second, the error in admitting this testimony was, under the circumstances of this case, harmless. The defendant himself had twice admitted that he was at the still and was operating it when the officers came up. It was in consequence of what Jim told the officers, they went to the still and found him there, operating it, and not evidence of his guilt.

The second exception was to the cross-examination of a character witness introduced by the defendant. The solicitor sought to test his evidence as to the character of another witness, who, by his own admission, went into the woods with a man who was manufacturing whiskey, to get whiskey from him. If there was any error in asking this question, it was eliminated by the answer of the witness, who answered that the character of the defendant was good, as far as he knew, adding: "I would not like to say that every white man or every colored man who tried to buy a little whiskey had a bad character."

Exceptions 3 and 4 were because the charge of the judge to the jury was as follows: "It is the law of North Carolina, gentlemen, that when a defendant, or one interested in the verdict of a jury, testifies, it is the duty of the jury to take his testimony with a grain of allowance and carefully scrutinize and scan it; but if, after such scrutiny, you are satisfied he is telling the truth, then it would be your duty to give his testimony the same credibility that you would give the testimony of a disinterested witness. Credibility, gentlemen of the jury, means worthiness of belief."

This instruction was correct. It has always been so held, and has recently been reaffirmed in *S. v. Barnhill,* 186 N. C., 446, and in *S. v. Williams,* 185 N. C., 666. In the latter case the Court said that it was no error where the court told the jury "they should receive the testimony of the defendants and relatives with caution and scrutiny; but if, after such scrutiny, you are satisfied that they are telling the truth, it will then be your duty to give it as much credit as you give the testimony of a disinterested witness."

In *S. v. Barnhill, supra,* the Court quoted *S. v. Williams* with approval, and also many other cases, for they are all uniform in expressing the idea that where defendants or relatives or persons interested in the action testify, the jury should consider their testimony with caution and scrutiny; but if, after such scrutiny, the jury are satisfied they are

telling the truth, it will then be the duty of the jury to give it as much credit as is given the testimony of a disinterested witness.

In *S. v. Nat,* 51 N. C., 114, it was held not improper for the judge to say to the jury that "when near relations deposed for near relations, their testimony was to be received, and ought to be received, with many grains of allowance"; and extended the rule to the testimony of the fellow-servants of the prisoner, adding, however, that if, after such scrutiny, the jury believed the witness, they should give as full credit to his testimony as if he were disinterested.

To the same purport, citing many cases, are *S. v. Fogleman,* 164 N. C., 461; *S. v. Byers,* 100 N. C., 518, and *S. v. Lance,* 166 N. C., 413, often cited since.

There is no hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, that the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested.

In this case the only witness for the defendant (except one character witness) was himself, and he had twice admitted his guilt.

No error.

STATE v. RAMP SMITH.

(Filed 26 March, 1924.)

1. Criminal Law—Deadly Weapon—Courts—Matters of Law—Questions for Jury.

An instrument used in an assault which is likely to produce death or inflict great bodily harm upon the one assaulted, in the manner of its use, with regard to the condition of the one assaulted, may be held a deadly weapon, as a matter of law, and is not to be submitted to the jury as an issue of fact unless its use, under the circumstances, may or may not have been likely to produce fatal results.

2. Same—Murder—Manslaughter—Instructions—Malice—Presumptions.

Where the defendant was tried for murder in the second degree and convicted of manslaughter, or the unlawful killing of a human being without malice and without premeditation and deliberation, under evidence tending to show that he had struck on the head and killed the deceased with a baseball bat while engaged in a fight with him, an instruction that the law presumes malice from the use of a deadly weapon is not erroneous.

3. Same—Self-defense—Excusable Homicide—Burden of Proof.

Where it is admitted or established that the prisoner on trial for murder had killed the deceased with a deadly weapon, but without premedi-

tation and deliberation, the law raises the presumption, first, that the killing was unlawful, and second, that it was done with malice, which is murder in the second degree; it then being for the prisoner to show to the satisfaction of the jury the facts that would reduce the crime from second-degree murder to manslaughter, or to justify himself upon the plea of self-defense.

APPEAL by defendant from *Calvert, J.*, at January Term, 1924, of PENDER.

Criminal prosecution, tried upon an indictment charging the defendant with murder in the second degree.

From a verdict of manslaughter, and judgment pronounced thereon, the defendant appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. McClammy and Emmett H. Bellamy for defendant.

STACY, J. The defendant killed one J. O. Singleton by striking him on the head with a baseball bat. The two men had been engaged in a fight, and the defendant contended that he slew the deceased in his own proper self-defense. The jury convicted the defendant of manslaughter, which is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Baldwin,* 152 N. C., 822.

Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N. C., p. 179. The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *S. v. Archbell,* 139 N. C., 537; *S. v. Sinclair,* 120 N. C., 603; *S. v. Norwood,* 115 N. C., 789.

Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. *S. v. Sinclair, supra.* But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N. C., 505; *Krchnavy v. State,* 43 Neb., 337. A pistol or a gun is a deadly weapon (*S. v. Benson,* 183 N. C., 795); and we apprehend a baseball bat should be similarly denominated if viciously used, as under the circumstances of this case. *S. v. Brown,* 67 Iowa, 289; *Crow v. State,* 21 L. R. A. (N. S.), 497, and note.

The defendant claimed that he struck Singleton in self-defense; and appellant's chief exception is the one directed to the following portion of his Honor's charge: "The law presumes malice from the intentional slaying of a human being with a deadly weapon, and where the defendant admits the killing or the evidence satisfies the jury beyond a reasonable doubt that one has slain his fellow-man intentionally with a deadly weapon, the law imposes upon the defendant the burden of disproving malice, if the defendant would reduce the grade of the offense from murder to manslaughter. In other words, he must in such a case satisfy the jury, but not beyond a reasonable doubt, that the slaying was without malice, and if he would further entitle himself to a verdict of not guilty, the law imposes upon him the burden of excusing the killing upon the principle of self-defense."

We find no error in this instruction.

When it is admitted or established by evidence that the defendant killed the deceased with a deadly weapon, the law raises two presumptions against him: first, that the killing was unlawful, and second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Fowler,* 151 N. C., 732.

The law then casts upon the defendant the burden of proving to the satisfaction of the jury, not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury (*S. v. Carland,* 90 N. C., 675), the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure. *S. v. Little,* 178 N. C., 722.

The record presents no reversible error, and hence the verdict and judgment entered below must be upheld.

No error.

J. P. LEONARD v. J. P. DAVIS AND Z. B. DAVIS.

(Filed 26 March, 1924.)

1. Appeal and Error—Objections and Exceptions—Rules of Court.

The rules prescribed for the presentation of exceptions on appeal will be uniformly enforced, and a general exception that competent and relevant evidence had erroneously been excluded, with broad references to pages of the record, will not be considered.

2. Evidence—Corroboration—Witnesses—Impeachment.

Where plaintiff, a witness in his own behalf, on cross-examination, is sought to be impeached by the question if, during a certain period, he had

not left the State as a fugitive from justice, it is competent for him, in corroboration of his testimony, to introduce his certificate of honorable discharge from the army after serving in the World War for that period.

3. Same—Appeal and Error—Motions to Strike Out—Objections and Exceptions.

Where the evidence introduced upon the trial is competent in corroboration only, the objecting party must aptly request its restriction to that purpose, and he may not otherwise successfully sustain his exception to its competency as substantive evidence.

APPEAL by defendants from *Calvert, J.*, at November Term, 1923, of FRANKLIN.

Civil action in ejectment tried upon the following issues:

"1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: Yes.

"2. Do the defendants wrongfully withhold the same from his possession? Answer: Yes.

"3. What is the annual rental value of said land? Answer: $35."

Judgment on the verdict for plaintiff. Defendants appeal, assigning errors.

W. M. Person and Wm. H. and Thos. W. Ruffin for plaintiff.

W. H. Yarborough, Ben T. Holden, Edward F. Griffin, and Wm. Y. Bickett for defendants.

STACY, J. The third assignment of error is as follows: "This objection is based upon the court's refusal to admit evidence competent and relevant to the suit (R., p. 17)." And there are several other assignments of error of exactly the same tenor. We are precluded from considering these exceptions as they do not comply with the rules of practice prescribed for the presentation of exceptions on appeal. *Byrd v. Southerland,* 186 N. C., 384. Rules are of no value unless they are to be observed uniformly and without exception, in the absence of some valid reason therefor. *Lee v. Baird,* 146 N. C., 361.

On the cross-examination of plaintiff, who was a witness in his own behalf, defendants sought to impeach his testimony by showing that he had left the State in 1914, as a fugitive from justice; and for this reason he had only recently returned to Franklin County. Plaintiff contended that he had never left the State permanently, but had been in the army continuously since 1914, and that when he was discharged in 1920 he was given transportation to his home in North Carolina. In corroboration of this testimony, plaintiff was allowed to offer in evidence, over objection of defendants, his certificate showing an honorable discharge from the army. The first reference to the certificate of

discharge was made by defendants in their cross-examination, and it was not introduced in evidence until after the plaintiff had been charged with being a fugitive from justice. It showed the date of his enlistment, place of his residence, and other incidents of his continuous service until his honorable discharge, and concluded with the statement that he was entitled to transportation to his home in North Carolina. For these purposes of corroboration it was clearly competent; and if defendants wished to have its introduction thus restricted they should have asked for it at the time of its admission. Rule 21, 185 N. C., 795. *Nance v. Tel. Co.,* 177 N. C., 315; *S. v. McGlammery,* 173 N. C., 750.

The case of *Stanley v. Lumber Co.,* 184 N. C., 302, is clearly distinguishable from the one at bar. There the plaintiff undertook to show by his certificate of discharge, in an action to recover damages for a personal injury, that he was in good physical condition when released from the army. These statements were made and certified by third parties, not witnesses at the trial, and were offered as substantive evidence.

The record presents no reversible error, and the judgment entered below will be upheld.

No error.

L. H. MARTIN AND WIFE v. R. E. LEWIS, SHERIFF OF ROBESON COUNTY, AND A. L. BULLOCK.

(Filed 26 March, 1924.)

Estates—Husband and Wife—Entireties—Judgments—Liens—Execution.

Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them.

APPEAL by defendants from *Cranmer, J.,* at February Term, 1924, of ROBESON.

This is an injunction to restrain the sheriff of Robeson from selling lands held by the plaintiffs as tenants by the entirety under an execution issued upon a judgment taken against the husband and wife jointly in favor of the defendant A. L. Bullock. The sheriff advertized the excess of the plaintiffs' real estate over and above the two homesteads allotted them as tenants by the entirety. The plaintiffs applied to the court for an injunction. Restraining order was issued by *Martin, J.,* which was made permanent by *Cranmer, J.,* at February Term, and defendants appealed.

W. E. Lynch and Johnson, Johnson & McLeod for plaintiffs.
McLean, Varser, McLean & Stacy for defendants.

CLARK, C. J. The only question presented is whether a judgment against a man and his wife jointly is a lien upon real estate held by them as tenants by the entirety.

When there is a judgment against only the husband or the wife, with us no lien attaches against the estate by the entirety, though it is otherwise in some States. This case presents for the first time in this Court the question whether, when the judgment is a joint judgment against the man and his wife, the property can be sold thereunder. Wherever this question has been passed upon in any jurisdiction, such judgment has always been held to be valid lien upon the realty held by the judgment debtors as tenants by the entirety. The exact point as to a lien upon lands held by the entirety was presented in *Finch v. Cecil,* 170 N. C., 72, in which case a man and wife had contracted for materials to build a house upon a tract of land held by them as tenants by the entirety, and the Court held that the materialman had a lien upon the house and real estate (the house being a part of the freehold), because the contract for materials was made by the husband and wife jointly. It was held that if the contract for the materials had been made by either the husband or wife, without the joinder of the other, the materialman would not have had a lien upon the realty for the material furnished to build a house thereon.

In that case the Court said: "The indebtedness is due by both the defendants who joined in the contract. If the debt were owing by the husband or the wife for material furnished to erect a building upon property so held, it would be uncertain who would be the survivor, and in such case we have held that an estate by the entireties cannot be encumbered nor a lien acquired upon it without the assent of the other. *West v. R. R.,* 140 N. C., 620; *Bruce v. Nicholson,* 109 N. C., 202. Nor would a judgment against either be a lien upon the property. *Hood v. Mercer,* 150 N. C., 699. The reason given is, that 'at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the rights of the survivor.' 15 A. & E. (2 ed.), 840, citing *West v. R. R., supra.*"

The direct question presented in this case has been passed upon by several courts of last resort in other States, where the doctrine of tenants by the entirety is still recognized, and, without a single exception, all these courts hold that a judgment against the husband and wife jointly is a judgment by the entireties, and therefore a lien upon real estate held by them as tenants by the entireties.

In *Frey v. McGaw,* 127 Md., 23; L. R. A., 1916 D 113, the Court says: "The case as presented is entirely different from what it would have been if the judgment had been against either Mr. or Mrs. Frey alone. This arises from the peculiar nature of the estate by entireties. It has been repeatedly held in this State that when a judgment is recovered against one of two tenants by entirety, no lien can attach to the interest of the one. *Jordan v. Reynolds,* 105 Md., 288; 9 L. R. A. (N. S.), 1026; 121 Am. St., 578; 12 Anno. Cas., 51, and cases there cited. But it has never been held in this State, or elsewhere, that in the absence of statutory exemption, where there is an entire judgment against joint defendants, no lien is imposed upon estates or interest in lands held by the entireties."

This was again held in *Ades v. Caplan,* 132 Md., 56; L. R. A., 1918 D 276; *Ewing v. Rider,* 125 Md., 149, and also in *Sharpe v. Baker,* 51 Ind. App., 547; *Ditching Co. v. Beck,* 99 Ind., 247, and in *Sanford v. Bertrau,* 204 Mich., 244. In the latter case the Court held that "land held by husband and wife as tenants by entireties is not subject to levy under execution on a judgment rendered against either husband or wife alone, because the right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent; but a judgment rendered against husband and wife jointly may be satisfied out of an estate in land held by them as tenants by entireties"; and said that, while an execution upon a judgment rendered against one of two tenants by entireties cannot be levied on real estate held by them as tenants in common, "after diligent search by counsel and by the writer of this opinion, a case has not been found which holds that an estate in land held by husband and wife as tenants by entireties is not subject to execution upon a judgment against them jointly. On the contrary, the few cases in which this question is presented hold that a judgment rendered against husband and wife jointly may be satisfied out of an estate in land held by them as tenants by entireties," and cites at length from *Sharpe v. Baker,* 51 Ind., App., 547, which is an elaborate discussion with the same conclusion; and *Frey v. McGaw,* 127 Md., 23, and *Bank v. Muncie,* 180 Ind., 470, and thus concludes: "We find no cases to the contrary. Upon principle we can see no reason why the real estate of husband and wife held by them as tenants by the entireties (independent of homestead and statutory exemptions) should not be subjected to the payment of their joint debts. They own the entire property. The parts cannot be greater than the whole. They may dispose of it by their joint action. Each is liable to pay the whole judgment, and both are liable to pay any part of it."

The Michigan Court also says in that case, at p. 254: "If defendants may own and hold this property, free from execution, levy and sale for

their joint debt, they may by the same rule own and hold millions of dollars worth of real estate free from such levy and sale for their joint debt. This rule ought not to obtain as one affecting real estate, unless there is some good reason for it; and we have been unable to discover any such reason. The policy of the law ought to prevent the tying-up of vast amounts of real estate in this manner. We do not believe there is any good reason for the rule contended for by appellants."

In 30 Corpus Juris, 573, the general rule of law on this subject is thus laid down: "A judgment against both husband and wife is a general lien on the interest of both in the property held by them as tenants by the entireties, and the property may be sold under execution issued on the judgment. In such case a tenant by entireties has no separate interest or property in the entirety estate which can be claimed as exempt; the right of an execution defendant to claim property as exempt extends only to property in which he has an individual interest."

In this case the question as to exemption of the homestead estate does not arise, for there was actually laid off two homesteads—one for the wife and one for the husband—and only the excess over and above both homesteads was levied upon and sought to be sold.

It would seem that if any homestead should be allowed, there could only be one, seeing that in no event could the survivor have more than the one homestead. This exemption should be the husband's homestead and held on the same terms, *i. e.,* by entireties, for his life, and if he should not be the longer liver, then for the life of his wife. We make, however, no decision on this point, for it would be merely *obiter dictum,* not being necessary in this instance.

All the cases as above concur, and not one has held to the contrary upon the point here presented, that upon a joint judgment against husband and wife there is a lien upon the estate by entireties. The plaintiffs rely upon an *obiter dictum* in *Bank v. McEwen,* 160 N. C., 416, where the Justice writing the opinion says, quoting from Rorer on Judicial Sales, that a judgment against one tenant by the entireties is not a lien upon the land during their joint lives, but this was *obiter,* for the question there presented had no bearing as to a judgment against two tenants by entirety upon a joint and several indebtedness.

The estate by entireties was not created, either in England or in this State, by any statute, and it has been contended that it was abolished by our statute in 1784, now C. S., 1735, converting all joint estates into tenancy in common, and still more so by the constitutional change (Article X, sec. 6), conferring upon a married woman the same rights in her property "as if she had remained single." By reason of similar statutes, or statutes especially repealing the estate by entireties, that anomalous estate has disappeared in all but a very few States in this

country, and in them, as above said, there is no case to be found which does not hold that upon a joint judgment against husband and wife the estate by entirety can be sold.

An estate by entireties is a haven for a debtor who would by this device exempt property from liability for any debt, either of himself or his wife, but while under our decisions the estate by entireties, notwithstanding the provisions of law above cited, still confers an absolute exemption and immunity from lien and sale upon a judgment against either husband or wife, there is no reason, as the above decisions hold, why, when there is a joint judgment upon a joint obligation of husband and wife that their interest in real estate conferred by a deed executed to both of them, and which it is admitted can be conveyed by their joint deed, should not be subjected to lien and execution upon a judgment obtained against them jointly.

The judgment below is

Reversed.

STATE v. ROBERT MANGUM.

(Filed 26 March, 1924.)

1. Criminal Law—Concealed Weapons—Evidence—Statutes.

Upon evidence tending to show that an officer arrested the defendant when the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, with the apparent intent of interfering with the safe-keeping of a prisoner the officer was guarding, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of the statute. C. S., 4410.

2. Same—Punishment—Discretion of Court—Constitutional Law.

The statute against carrying a concealed weapon is for peace and the preservation of human life and limb, the punishment for its violation being in the discretion of the trial judge imposing the sentence of a fine, not less than $50 nor more than $200, or imprisonment not less than thirty days nor more than two years; and a sentence to imprisonment for four months, under the facts of this case, *is held* not to be "excessive" or cruel or unusual within the inhibition of Article I, section 14, of the Constitution.

APPEAL by defendant from *Calvert, J.*, at September Term, 1923, of WAKE.

Criminal action. The evidence is as follows:

G. H. Fuller testified: "That he is a policeman in the town of Wake Forest, and that on the night of 18 July and the early morning of 19 July, on account of the flimsy condition of the town lock-up, he was guarding the prison against any escape of prisoners locked therein; that

the prison is near the street, on the ground floor, and consists of a large room, with cells in the rear; that the front door was open, and a light in the large room; that about 4 o'clock in the morning the defendant and two others approached the front door and inquired what he had the man locked up for. The witness replied that was very little of their business; that he observed a pistol in the pocket of the defendant, with about an inch or so sticking out, the pistol being in the pocket, handle down. The witness told the darkies to come on the inside, and made them throw up their hands, and searched them, finding and taking the pistol from the defendant. He told the defendant to consider himself under arrest; that he found nothing on the other men, and let them go. The defendant explained that he had been in Granville County to see his father and was on his way back to his work in Forestville; that the pistol belonged to his father, who had asked him to take it along and have it repaired, as it did not seem to work all right and the cylinder to it would not revolve. The witness further stated that, at the time of the search and arrest of the defendant, defendant did not have on a coat, but carried it on his left arm. Witness further stated that he fired the pistol and it seemed to work all right. The pistol was introduced by the State and exhibited to the jury."

The State rested. The defendant moved for nonsuit, which was refused. The defendant offered no evidence.

The court below instructed the jury, in substance, as follows:

"That the burden was upon the State to satisfy them beyond a reasonable doubt of the guilt of the defendant; that he had the pistol concealed on his person while off his own premises; that the statute made the possession of a pistol off his premises *prima facie* evidence of the concealment thereof, which could be rebutted by the defendant; that this *prima facie* evidence did not make the defendant guilty, but that it was for the jury to say, from all the evidence, whether or not at any time during the period testified of, that the defendant carried the pistol concealed, and that if at any time during this period he carried it concealed off his own premises, that he would be guilty; that the burden was upon the State to prove the guilt of the defendant beyond a reasonable doubt; and that if the State had so satisfied the jury they should find him guilty, and if not so satisfied, to find him not guilty."

The defendant excepted to the charge as given. The jury returned a verdict of guilty. The court pronounced judgment that the defendant be imprisoned in the common jail of Wake County for the term of four months, and assigned to work on the public roads of Wake County. The defendant excepted, and appealed to the Supreme Court, and assigned error, as follows:

1. In not allowing the defendant's motion for judgment as of nonsuit.

2. In that he did not charge the jury that the gist of the offense was in the intention to carry the pistol concealed.

3. For that the punishment, four months on the roads for a mere technical violation of the law, if he had been guilty, is cruel and excessive.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

N. Y. Gulley for defendant.

CLARKSON, J. We think that it was a case that should be submitted to the jury upon the question of the concealment, not the purpose of the concealment, but actual concealment. It was not such a direct contradiction of guilt as appeared in *State v. Roten,* 86 N. C., 701, cited by defendant in his brief. There the defendant carried the pistol about his person openly, to the view of everybody. Manifestly no person could be convicted of carrying a weapon concealed when that weapon was not concealed. *S. v. Dixon,* 114 N. C., 850; *S. v. Lilly,* 116 N. C., 1049; *S. v. Reams,* 121 N. C., 556; *S. v. Brown,* 125 N. C., 704; *S. v. Woodlief,* 172 N. C., 887.

Walker, J., in the *Woodlief case, supra,* p. 887, on the question of concealment, has so recently and well said, that we repeat: "It is no defense to a charge of unlawfully carrying a concealed weapon that it was done for the purpose of self-defense. *S. v. Speller,* 86 N. C., 697; *S. v. Woodfin,* 87 N. C., 526; *S. v. Broadnax,* 91 N. C., 543. The guilt appears legally from the intent to carry the weapon concealed. *S. v. Dixon,* 114 N. C., 850; *S. v. Pigford,* 117 N. C., 748; *S. v. Brown,* 125 N. C., 704. The above cases show that one of the mischiefs intended to be remedied is the practice of carrying concealed weapons, to be used on an emergency. *Justice Ashe* said, in *S. v. Broadnax, supra:* 'The mischief intended to be remedied by the statute was the practice of wearing offensive weapons concealed about the person, or carrying them so concealed with a purpose to be used offensively or defensively upon an emergency.' And *Justice Ruffin* said, in *S. v. Speller,* 86 N. C., 697: 'The right to wear secret weapons is no more essential in the protection of one man than another, and surely it cannot be supposed that the law intends that an unwary advantage should be taken even of an enemy. Hence it takes no note whether the secret carrying be done in a spirit of foolish recklessness or from a sense of apprehended danger, but in either case declares it to be unlawful. Indeed, were there any difference made, we might expect it to be against one who felt himself to be under some pressure of necessity, since in his case the mischievous consequences intended to be avoided might the more reasonably be antici-

pated. And it would be a strange passage in the history of legislation to enact that it shall be unlawful for any person to carry concealed weapons about his person, except when it may be supposed he shall have occasion to use them.' "

The Constitution of North Carolina, Art. I, sec. 14, says: "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

In the *Woodlief case, supra,* p. 888, on the question of "cruel or unusual punishment," *Walker, J.,* said: "We may assume, for the sake of discussion, the jurisdiction of this Court to review a judgment below, upon the ground that the particular punishment imposed by the court is 'cruel and unusual,' where the law gives to the judge a discretion to fix the punishment, as it does in respect to this crime. Revisal, sec. 3708; *S. v. Manuel,* 20 N. C., bottom page 122 (4 Dev. & Bat., 20); *S. v. Driver,* 78 N. C., 423. In the *Driver case* the Court held that 'there is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is cannot be prescribed. It ought to be left to the judge who inflicts it, under the circumstances of each case, and it ought not to be abused.' The Court adds that it ought not to be interfered with, 'except where the abuse is palpable.' "

The Legislature, in its wisdom, has passed the statute against carrying concealed weapons. Its purpose was for peace and the preservation of human life and limb. Carrying weapons concealed has proven a menace, and the Legislature has seen fit to pass the following act (C. S., 4410):

"If any person, except when on his own premises, shall carry concealed about his person any bowie-knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles, or razor, or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court. If any one, except on his own premises, shall carry concealed about his person any pistol or gun, he shall be guilty of a misdemeanor and shall be fined not less than $50 nor more than $200, or imprisoned not less than thirty days nor more than two years, at the discretion of the court. Upon conviction or submission, the deadly weapon, with reference to which the defendant shall have been convicted, shall be condemned and ordered confiscated and destroyed by the judge presiding at the trial. If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof. This section shall not apply to the following persons: Officers and soldiers of the United States Army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia

and the State Guard when called into actual service, officers of the State or of any county, city or town charged with the execution of the laws of the State, when acting in the discharge of their official duties."

The statute prescribes the punishment, "or imprisoned not less than thirty days nor more than two years, at the discretion of the court." The court below fixed the imprisonment four months. This the court had a right to do, under the plain language of the act. We can find

No error.

STATE v. LEXIE MELTON.

(Filed 2 April, 1924.)

1. Homicide—Murder—Evidence—Alibi—Instructions.

The defendant, charged with murder, introduced evidence of an *alibi* which was material to his defense. In his charge to the jury the judge did not refer to this evidence: *Held*, error. C. S., 564.

STACY, J., concurring.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1924, of HOKE.

Criminal action. Defendant appealed from the judgment pronounced on a conviction for manslaughter.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Currie & Leach and W. H. Weatherspoon for defendant.

ADAMS, J. The defendant's evidence tended to show that on Saturday night, 20 August, 1921, Walter Smith, the deceased, went to the home of W. N. Brown, whose daughter was the defendant's wife, and that early Sunday morning the deceased, the defendant, and Frank Brown, a son of W. A. Brown, were together at Dave Williams's. The deceased had been drinking freely and these three went to a place in the woods where some whiskey had been concealed and poured a quantity of it from a jug into a fruit jar. They then went to the "still ford" where they stopped and drank some of the liquor. The deceased said he was "sick." The defendant and Brown tried to induce him to go with them, and failing in their effort, they carried him about forty yards from the branch, laid him down, and left him.

There was other evidence tending to show that the defendant told one of the witnesses where he had last seen the deceased, and that the

body was found at this place on Monday morning about nine or ten o'clock, bruised and discolored. On the right side of the head there was a bruise which had probably been caused by a blunt instrument, and another above the eye; also a "longitudinal bruise" on the back, indicating that the deceased had been struck while lying down. His throat was swollen and his chest discolored; there were finger-prints on his throat—"two impressions with demarkation between them." A physician testified that he examined the deceased at eleven o'clock on Monday; that he had been dead "six to eight to ten hours," and that his death had been caused by choking or suffocation.

The defendant testified that he last saw the deceased on Sunday morning between seven and eight o'clock, but there were circumstances from which the jury might have inferred and no doubt did infer that the deceased was carried into the woods several hours later.

If the deceased had been dead from six to ten hours when the physician made his examination, the death occurred between midnight and five o'clock on Monday morning. In order to meet this theory the defendant introduced evidence of an alibi, he and his wife testifying that on Sunday afternoon they went to Neill Baker's and remained there all night. As to this circumstance their evidence was corroborated by that of Neill Baker.

In his charge to the jury his Honor did not refer to this contention or instruct the jury as to the law applicable to evidence of an alibi, and to this omission the defendant entered an exception. The question is whether, in the absence of a special request, his Honor's failure to instruct the jury upon this phase of the evidence constitutes reversible error.

The statute provides that the judge shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. C. S., 564. When a judge, in compliance with this mandate, instructs the jury upon the essential features of a case he is not required to give additional instructions upon its subordinate features or to explain more fully a particular phase of the evidence unless there be a prayer for such instruction. Instances of the substantive and essential features of the case are given in *S. v. Thomas,* 184 N. C., 757; *Butler v. Mfg. Co.,* 182 N. C., 547, and *Real Estate Co. v. Moser,* 175 N. C., 259, and an instance of a subordinate feature in *S. v. O'Neal, ante,* 22.

The defendant's evidence of an alibi was substantive; it was vital; it was perhaps the chief defense on which he relied; and without tendering a special prayer he was entitled to an instruction as to the legal effect of his evidence if it should be accepted by the jury.

In our opinion his Honor properly refused the defendant's motion to dismiss the action as in case of nonsuit. Although the evidence was entirely circumstantial, the circumstances disclosed were of sufficient probative force to demand of the jury the final determination of the defendant's guilt or innocence.

For the error assigned there must be a

New trial.

STACY, J., concurs in the result reached by the majority that a new trial should be granted for failure of his Honor, at any time during his charge, to refer to the defendant's evidence tending to establish an alibi; and further, is of the opinion that the defendant's demurrer to the evidence and motion for dismissal or for judgment as of nonsuit, made under C. S., 4643, should have been allowed.

It is the accepted rule of law, at least in felonies and capital cases, that where the State relies for a conviction upon circumstantial evidence alone, the facts established or adduced on the hearing must be of such a nature and so related to each other as to point unerringly to the defendant's guilt and exclude every rational hypothesis of innocence. *S. v. Brackville,* 106 N. C., p. 710; *S. v. Goodson,* 107 N. C., 798; *S. v. Wilcox,* 132 N. C., p. 1139; 23 C. J., 49; 8 R. C. L., 225; *Rippey v. Miller,* 46 N. C., 479. Tested by this rule, to my mind, there is no sufficient evidence appearing on the record to warrant a conviction of the present defendant.

MARGARET L. TEAGUE, ADMX., v. F. E. CURRENT ET ALS.

(Filed 2 April, 1924.)

Wills—Devise—Estates—Limited Use—Remainders—Trusts—Powers of Sale—Equity—Injunction.

A devise of lands to the testator's widow for her to have and use it as she needs, and make such disposition thereof as will be best for her welfare, and at her death to the children of the marriage: *Held,* the widow holds the land in trust for the children, who take in remainder so much thereof as the widow may not have required for her needs during her life, and otherwise there is no authority vested in her under the power of sale. *Semble,* upon a petition to the court, the remaindermen may restrain a sale of the lands in violation of the trust imposed.

APPEAL by defendants from *Devin, J.,* at October Term, 1923, of PERSON, upon an agreed statement of facts. From the judgment of the court construing the will of R. J. Teague, who died 27 December, 1920, the defendants appealed.

Luther M. Carlton for plaintiffs.
Wm. D. Merritt and F. O. Carver for defendants.

CLARK, C. J. The will of R. J. Teague presented for our construction is as follows: "It is my will and desire that my beloved wife, in whom I have all confidence, Margaret Long Teague, have charge of all my estate to do as she pleases with—use so much as she needs. I bequeath $3,000 (three thousand dollars) to my sister, Mrs. F. E. Current, also an equal amount to my sister, Mrs. Rosa M. Guffy, Cleveland, R. F. D. No. 2, and request that she use it in educating her children. I want my wife to use all that she needs and make such disposition as is best for her welfare, and at her death the remainder of my estate to go to the above-named sisters in equal shares; and if either or neither of them is living, then to their children or heirs of their bodies."

The special bequests of $3,000 each to the parties named have been paid to them and there is no controversy about the remainder of the personal estate, it being agreed that the same belongs to the testator's widow after payment of debts, and all debts have been paid except inheritance tax on the estate. It is further agreed that the widow of the testator is 46 years of age and in possession of the real estate described, and claims the right under said will to dispose of same in fee simple. And the defendants, Mrs. F. E. Current and Mrs. Rosa M. Guffy, sisters of testator mentioned in the will, assert that said widow has only a life estate and with remainder in fee to them. And the other defendants, the children of Mrs. F. E. Current and Mrs. Rosa Guffy, claim a contingent interest determinable only at the termination of the life estate of Margaret L. Teague. The widow, Mrs. Margaret L. Teague, has a separate estate of her own. The testator, R. J. Teague, left no children. The inheritance tax required by statute to be paid by the administratrix it is agreed shall be ascertained and paid according as the court shall hold as to the respective interest of the parties hereto in the real estate, there being no controversy as to the personal estate.

It is further agreed that the real estate consists of 34 acres lying in or near the corporate limits of Roxboro and of a lot in Henderson County. The plaintiff contends and the court so held that the widow and devisee of deceased has power to convey in fee simple the real estate above set forth.

The Court is of opinion that the devise to the widow is not a fee simple nor a mere life estate but that it is in trust to her for the purposes named in the will, to wit: that she shall "use all of it that she needs and make such disposition as is best for her welfare, and at her

death the remainder of my estate to go to the above-named sisters in equal shares," and to the children or heirs of such of them as shall then be deceased.

It is evident that the testator intended that his wife should use this property not arbitrarily nor wastefully but that she should use it for her needs and best welfare with a devise over of whatever is left at her death, as above stated. The widow cannot purposely make way with it nor can she devise it over at her death.

We apprehend that she has power to sell the above realty for the *bona fide* purposes above named. It is not necessary that she should apply to the court for leave to sell. She holds the estate in trust for the *bona fide* purposes above named.

Should, which does not appear in this record, she in time desire to sell and convey the property for other purposes than that named in the will or to make way with it, then upon a petition in court she may be restrained to the observance of the use of the property or of its proceeds in accordance with the uses prescribed in the will, and upon a sufficient showing the court might conceivably require the remainder of the proceeds to be invested for the benefit of those who are designated to take in remainder at her death.

There is no intimation in this case whatever that the widow intends to make way with the property or to use it for other purposes than that mentioned in the will. We mention the fact that in a proper construction of the will, upon such showing of facts, the court can take steps that the trustee, which in this case is the widow, of such fund shall not divert it from the purposes prescribed by the will, which is for the legitimate needs of the widow, and that the remainder shall go over to the parties named. Like all trusts, it must be exercised in good faith, and is subject to the supervision of the court, if invoked, upon facts requiring its interposition.

The plaintiffs and the defendants agree that Mrs. Teague has only a life estate in the land, but they differ as to the question of the power of sale and to convey the same in fee. The defendants contend that the will gives no such power. There have been many cases construing the devise of property as in this case to be used in the judgment of the first taker for her needs and welfare and like purposes.

Modified and affirmed.

ALICE PYLES v. GEORGE M. PYLES AND FARMERS AND MERCHANTS BANK.

(Filed 2 April, 1924.)

Judgments—Pleadings—Default of Answer—Banks and Banking—Deposits—Default and Inquiry—Appeal and Error—New Trial.

Where the liability of a bank, a codefendant, depends solely upon the amount of money the principal defendant had on deposit at the time of the issuance of the summons, a judgment against the bank by default of an answer should be by default and inquiry, and a judgment by default final, making the bank liable beyond the amount of the deposit, is reversible error.

APPEAL by defendant bank from *Devin, J.*, at October Term, 1923, of ORANGE.

Civil action. Summons was issued by the clerk of the Superior Court of Orange County, 30 August, 1921, returnable 3 October, 1921, before said clerk, and said summons was served by the sheriff of Orange County 30 August, 1921, on Farmers and Merchants Bank by reading the summons to and leaving a copy thereof and a copy of the complaint with S. A. Johnson, cashier of said bank, and served on Geo. M. Pyles 1 September, 1921. A duly verified complaint was filed in the office of the clerk of the Superior Court 30 August, 1921. On 17 September, 1921, the defendant Geo. M. Pyles filed a duly verified answer, denying the principal allegations of the complaint. The defendant bank neither demurred to the complaint nor filed answer thereto. Issues of fact being raised by the pleadings filed, the clerk transferred the case to the civil docket for trial at term time, and no judgment by default nor judgment by default and inquiry was entered against the defendant Farmers and Merchants Bank.

There having been no answer filed by the defendant the Farmers and Merchants Bank, and no appearance by representative or attorney at the time case was called, nor until after completion of plaintiff's direct testimony, there was no evidence offered by plaintiff on the trial to show what amount of money the defendant Geo. M. Pyles had in the Farmers and Merchants Bank in his name, or in the name of any other person, on 30 August, 1921, and no evidence as to what amount, if any, he had on deposit in said bank at the time of the trial.

Just before the close of the evidence of the defendant Geo. M. Pyles, the defendant the Farmers and Merchants Bank asked the court to be permitted to introduce evidence by its cashier, S. A. Johnson, to show the amount of money on deposit in said bank in the name of Geo. M. Pyles on 30 August, 1921. Objection being made by plaintiff, the court below refused to permit the witness to testify upon the ground

that same came too late, there having been no answer filed, and intimated that plaintiff was entitled to judgment against the defendant the Farmers and Merchants Bank. The evidence of the witness Johnson would have been to the effect that there was only $200 on deposit in said bank in the name of Geo. M. Pyles on 30 August, 1921. To the rejection of this evidence by the court the defendant the Farmers and Merchants Bank, in apt time, excepted and now assigns the same as error.

Upon the trial the court below submitted one issue to the jury, as follows:

"1. Is the defendant, Geo. M. Pyles, indebted to the plaintiff for money had and received, as alleged in the complaint, and if so, in what amount?" The jury answered this issue "$520."

After the jury had returned a verdict as above set forth, the defendant Farmers and Merchants Bank requested the court to enter judgment by default and inquiry as to it. The court below declined to do so, and the defendant Farmers and Merchants Bank, in apt time, excepted and assigned the same as error.

The court then signed the judgment set out in the record, to which the defendant Farmers and Merchants Bank excepted, assigned the same as error, and appealed to this Court.

A. H. Graham for plaintiff.
Gattis & Gattis for defendant.

PER CURIAM. From a careful inspection of the allegations of the complaint we think that a judgment by default and inquiry should have been rendered against the Farmers and Merchants Bank rather than a judgment by default final.

On the hearing in the court below, evidence should be confined to what funds the defendant Geo. M. Pyles had in his name belonging to the plaintiff in the Farmers and Merchants Bank on 30 August, 1921, the time the summons and complaint were served on S. A. Johnson, cashier of the Farmers and Merchants Bank. There are no allegations as to liability of the bank except for moneys deposited therein by defendant Geo. M. Pyles.

Error.

WALTER H. BLAIR ET AL. v. BOARD OF COMMISSIONERS OF NEW HANOVER.

(Filed 2 April, 1924.)

1. Statutes—In Pari Materia—Special Acts—Interpretation—Intent.

While a special act of the Legislature, passed at the same session, construed *in pari materia* with a general law upon the same subject-matter, will ordinarily be interpreted as an exception thereto, this interpretation will give way to the true intent of the Legislature as gathered from the language of both acts, so construed.

2. Same—Counties—Bonds—Courthouses—Jails.

A local act of the Legislature authorized a certain county to issue bonds for the building of an annex to its courthouse and for the erection of a new county jail, and at the same session passed a general law, applicable to all of the counties of the State, enlarging the amount of bonds to be issued for these purposes, expressing that it was in addition to, and not in substitution of, any existing powers contained in any other law: *Held*, no conflict in the provisions of the two acts, and the county could issue valid bonds for the specific purpose to the extent authorized by the general law, under the provisions thereof.

APPEAL by defendants from *Calvert, J.*, at chambers, Wilmington, 3 March, 1924. From NEW HANOVER.

Civil action to restrain the Board of Commissioners of New Hanover County from issuing bonds of said county in excess of $150,000 for the purpose of constructing an annex or addition to the present county courthouse and for building a new county jail.

From an order permanently enjoining the defendants in accordance with plaintiff's prayer, the defendants appeal.

K. O. Burgwyn for plaintiff.
Bellamy & Bellamy for defendants.

STACY, J. Plaintiff, a resident and taxpayer of New Hanover County, brings this action on behalf of himself and all other persons similarly situated (*Eaton v. Graded School,* 184 N. C., 471) to restrain the defendants from issuing bonds of the county of New Hanover in excess of the amount authorized by chapter 361, Public-Local Laws 1923, for the purpose of constructing an annex or addition to the present county courthouse and for building a new county jail.

The single question presented by the appeal is one of statutory construction.

At the last session of the General Assembly two acts were passed, both relating to the subject-matter now in hand. On 2 March, 1923, a public-local statute, ch. 361, applicable only to New Hanover County

(hereafter called the New Hanover Act) was duly ratified and enacted into law. By this act the Board of Commissioners of New Hanover County is authorized and empowered to issue serial bonds of the county, in an amount not to exceed one hundred and fifty thousand dollars, to be used for the purpose of defraying the cost of repairing the present county courthouse and building an addition or annex thereto, the building of a new county jail, and for the purpose of purchasing the necessary equipment and furniture for both.

On the next day, 3 March, a public statute, chapter 143, applicable to all the counties of the State (hereafter called the General Act), was duly ratified and adopted. By this act the various boards of commissioners of the several counties throughout the State are authorized and empowered to issue bonds or notes, not to exceed 1 per cent of the assessed valuation of the taxable property in the county for the year next preceding the issuance thereof, for the purpose of borrowing money with which to erect, build, construct, alter, repair and improve courthouses and jails, and to purchase the necessary equipment and furniture to be used therein. Section 9 of said act is as follows: "The powers granted by this act are granted in addition to and not in substitution for existing powers of counties, and are not subject to any limitation or restriction contained in any other law. Nothing herein contained shall prevent any county from issuing bonds under any existing laws, as well as under this act."

The defendants, finding that they could not make the repairs and improvements, which they consider necessary and proper, for the sum limited in the New Hanover Act, resolved to supplement this amount by issuing bonds in excess of $150,000 under and by virtue of the General Act, being advised that they had authority, under said General Act, to issue county bonds, for the purposes mentioned therein, to an amount not exceeding 1 per cent of the assessed valuation of the taxable property in the county for the year next preceding the issuance thereof. It is admitted that the total amount of bonds proposed to be issued in the instant case comes well within the limit fixed by the General Act.

It is the position of the plaintiff that, as the two acts in question were passed at the same session of the General Assembly, they are to be considered in *pari materia,* and the New Hanover Act must be taken as constituting an exception to the General Act, under the principle "that where there are two opposing acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the

general act." *S. v. Johnson,* 170 N. C., p. 690; *Felmet v. Comrs.,* 186 N. C., 251, and cases there cited. This is undoubtedly an approved principle of law as applied to the interpretation of conflicting statutes enacted by the same Legislature. *Bramham v. Durham,* 171 N. C., p. 198, and cases there cited. But it is also a well-settled principle that in case of doubt or ambiguity the two enactments must be construed so as to effectuate the true intent and purpose of the lawmaking body. "The first canon in the construction of statutes is to ascertain the legislative intent, as gathered from the statute itself, which should be enforced accordingly as the only authentic expression of the popular will. We may consider other statutes relating to the same subject, and the purpose to be accomplished, where there is any real doubt as to the true meaning; but whenever and however discovered, the intent prevails over all other considerations." *Walker, J.,* in *S. v. Johnson, supra.*

It clearly appears, we think, from the 9th section of the General Act now before us, that the authority granted under this law was to be in addition to and not in substitution of any existing powers contained in any other law. Hence no conflict was intended and none exists between the provisions of the General Act and the New Hanover Act. The present case, therefore, falls directly within the doctrine announced in *Kinston v. R. R.,* 183 N. C., 14, and *Fawcett v. Mt. Airy,* 134 N. C., 125, to the effect that, having exhausted the powers conferred under the special act, the authorities may proceed under the general statute to the extent allowed by such law.

It follows that the restraining order issued in this cause and made permanent on the hearing must be dissolved.

Error.

STATE v. ELBERT HAYES.

(Filed 2 April, 1924.)

Evidence—Motions—Nonsuit—Statutes—Waiver.

Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first exception, and it is not subject to review in the Supreme Court on appeal. C. S., 4643.

APPEAL by defendant from *Devin, J.,* at October Term, 1923, of DURHAM.

STATE *v.* HAYES.

Criminal prosecution tried upon indictments charging the defendant with the larceny of certain goods and with receiving same knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

From an adverse verdict and judgment pronounced thereon, the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. W. Barbee and R. M. Gantt for defendant.

STACY, J. The defendant was indicted in two cases—one charging the larceny of certain automobile parts, the property of Alonzo Barbee, and with receiving same knowing them to have been feloniously stolen or taken; and the other charging the larceny of certain automobile parts, the property of Hall Tilley, and with receiving same knowing them to have been feloniously stolen or taken. The two cases were consolidated and tried together.

The chief exception presented on the record is the one directed to the refusal of the trial court to grant the defendant's motion for dismissal of the actions or for judgment as of nonsuit, made under C. S., 4643, after the State had produced its evidence and rested its case. After this motion had been overruled, the defendant offered evidence in his own behalf, and the motion was not renewed at the conclusion of all the evidence. The exception has been waived by the defendant. *S. v. Killian,* 173 N. C., 792. He had the right to rely upon the weakness of the State's testimony had he rested his case here. But having elected to offer evidence in his own behalf, he did so *cum onere,* and only his exception noted at the conclusion of all the evidence may be urged on appeal. *Harper v. Supply Co.,* 184 N. C., 204. Having failed to renew the motion at the conclusion of all the evidence, and the exception entered at the close of the State's evidence having been waived, the record presents no exception in this respect which may now be considered by us. This accords with the express terms of the statute. C. S., 4643.

The remaining exceptions and assignments of error present no new question or novel point of law. They are without special merit, and all of them must be overruled.

There is no legal error appearing on the record.

No error.

STATE v. JAMES WILLIAMS.

(Filed 2 April, 1924.)

Evidence—Criminal Law—Demurrer—Motion to Dismiss—Statutes—Appeal and Error.

Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of C. S., 4235, and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. C. S., 4643.

APPEAL by defendant from *Devin, J.*, at October Term, 1923, of DURHAM.

Criminal prosecution tried upon an indictment charging the defendant with the felonious breaking and entering of the Marion Cotton Mills, located in the city of Durham, with the intent, then and there, feloniously to steal, take and carry away certain goods and chattels, in violation of the provisions of C. S., 4235. There was no count in the bill charging the defendant with receiving stolen goods, knowing them to have been feloniously stolen or taken, in violation of the provisions of C. S., 4250.

From an adverse verdict and judgment pronounced thereon, the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. W. Barbee for defendant.

STACY, J. The only exception presented on the record is the one directed to the failure or refusal of the trial court to grant the defendant's motion for dismissal of the action or for judgment as of nonsuit, made under C. S., 4643, after the State had produced its evidence and rested its case. There was no testimony offered by the defendant.

The defendant was found in possession of some of the stolen goods within a very short time—one or two hours—after the mill had been entered and the goods feloniously taken therefrom. This was some evidence tending to connect the defendant with the offense and from which the jury was warranted in concluding that he had participated therein as one of the principals. *S. v. Hullen,* 133 N. C., 656; *S. v. McRae,* 120 N. C., 608. True there was other evidence, offered by the State, tending to show that Marvin Barbee and Lonnie Page actually broke into the building and feloniously carried the goods away, while, so far as the witnesses knew, the defendant was not present and

in no way aided and abetted Barbee and Page in the commission of the crime. But it was also in evidence that Barbee and Page gave the defendant, James Williams, a portion of the stolen goods in order to keep him from telling on them as he, the defendant, said "he knew where they got it."

Viewing the evidence in the light most favorable to the State, the accepted position on a motion of this kind (*S. v. Rountree,* 181 N. C., 535), we think the trial court was justified in submitting the case to the jury and that the verdict is fully warranted by the testimony. There is no exception to the charge. The demurrer to the evidence, or motion for dismissal, was properly overruled.

No error.

THE BANK OF MAXTON v. P. A. CANADAY ET AL.

(Filed 2 April, 1924.)

Deeds and Conveyances—Corporations—Probate.

Where, upon its face, a conveyance purports to be made by the proper officers of a corporation as the act and deed of the corporation for its lands, and it and its certification for registration by the clerk of the court are regular and in proper form, the deed will not be held as an invalid corporate conveyance for the failure of the notary before whom the proper officers had acknowledged it to certify that such officers acted therein in behalf of the corporation. *Bailey v. Hassell,* 184 N. C., 451.

APPEAL by defendants from *Cranmer, J.,* at February Term, 1924, of ROBESON.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff, being under contract to convey certain lands to defendants, executed and tendered warranty deed therefor. Defendants, being under written contract to buy, declined to accept the deed and refused to pay the purchase price, claiming that the title offered was defective. This suit is to determine the sufficiency of the title offered and to enforce the contract of purchase.

His Honor, being of opinion that the deed tendered was sufficient to convey a full and complete fee-simple title to the lands in question, gave judgment for the plaintiff, from which the defendants have excepted and appealed.

McKinnon, Fuller & McKinnon and Mordecai & Salmon for plaintiff.

Marshall T. Spears for defendants.

STACY, J. On the hearing, the title offered was properly made to depend upon the sufficiency of the following probate to a deed from a corporation, Harnett Lumber Company, to A. D. McKenzie, the said deed forming a link in plaintiff's chain of title:

NORTH CAROLINA—Robeson County.

I, J. S. Jones, a notary public in and for said county and State, do hereby certify that W. F. Williams, president, and W. J. Johnson, secretary and treasurer of the Harnett Lumber Company, personally appeared before me this date and acknowledged the due execution of the foregoing deed of conveyance. Let the same, with this certificate, be registered. Witness my hand and notarial seal, this 28 April, 1913.

(Seal.) J. S. JONES, N. P.

My commission expires 10 March, 1915.

The case states that the execution of said deed is in regular form; that it is signed in the name of the corporation by its president, attested by its secretary and treasurer, and the corporate seal duly affixed thereto; that the fiat of the clerk of the Superior Court, adjudging the probate to be correct and sufficient and ordering the instrument to registration, is in proper form, and that the deed was duly registered on 19 December, 1913.

We think the sufficiency of the probate in question must be upheld under what was said in *Bailey v. Hassell,* 184 N. C., 451, and *Withrell v. Murphy,* 154 N. C., p. 89. The judgment will be affirmed on authority of these cases.

While we uphold the sufficiency of the present probate, it may not be amiss to remark that the use of its kind, as a general practice, is not to be commended, for the very good reason that it borders near the line of defective probate and leads almost invariably to litigation, as witness the instant suit and the others above mentioned.

Affirmed.

A. A. McINNISH AND JAMES MONROE v. THE BOARD OF EDUCATION OF HOKE COUNTY.

(Filed 2 April, 1924.)

1. Schools—Education—Counties — Statutes — Discretionary Powers — Courts.

The county board of education is given discretionary powers by statute to direct and supervise the county school system for the benefit of all the children therein, including the duty, among others, of selecting a school site, with which the courts will not interfere in the absence of its abuse.

2. Same—School Sites—Trial by Jury—Constitutional Law.

The right to trial by jury upon an issue involving the exercise by a county board of education in its selection of a site for a public-school building therein, conferred by Public Laws 1923, ch. 136, is not given by Article XIX, section 1, of the State Constitution.

APPEAL from *Sinclair, J.*, at November Term, 1923, of HOKE.

On 2 January, 1923, the defendant consolidated Rockfish, Harmony, and Pine Forest School districts and selected a site for a suitable school building. The plaintiffs brought suit to enjoin the erection of the building on the proposed site chiefly for these reasons: (1) the track of the Aberdeen and Rockfish Railroad adjoins the lot and the passing, stopping, and shifting of trains will expose the children to danger; (2) a cotton gin is situated near the site; (3) an electric power line has been constructed over a part of the lot. The defendant filed an answer and specifically denied or explained the allegations of the complaint, and the motion for the restraining order was heard at chambers on 3 September, 1923, and denied. At the November term the case came on for hearing, and the plaintiffs moved for a jury trial and tendered issues relating to the alleged dangerous agencies and to the question whether the defendant had abused its discretion. The judge denied the plaintiffs' motion. To the denial of these motions the plaintiffs excepted and appealed.

Bullard & Stringfield for plaintiffs.

Currie & Leach and McIntyre, Lawrence & Proctor for defendant.

ADAMS, J. In our opinion his Honor was correct in denying each motion.

1. The county board of education is given the power and authority to direct and supervise the school system for the benefit of all the children in the county, and in the exercise of its functions to perform certain assigned duties. Among these is the duty of selecting sites and building schoolhouses, and the performance of this duty necessarily involves the exercise of discretion. P. L. 1923, ch. 136, sec. 28 *et seq.*, sec. 59 *et seq.*

In our jurisprudence the principle is established that in the absence of gross abuse the courts will not undertake to direct or control the discretion conferred by law upon a public officer. *School Com. v. Bd. of Ed.*, 186 N. C., 643; *Davenport v. Bd. of Ed.*, 183 N. C., 570; *Newton v. School Com.*, 158 N. C., 187; *Jeffress v. Greenville*, 154 N. C., 492, 500. The plaintiffs do not controvert this position but they insist that the defendant has abused its discretion and that the restraining

order should have been continued to the hearing. We have given the record a careful examination and find no such abuse of discretion as the plaintiffs have alleged.

2. The plaintiffs insist that they were entitled to a trial by jury as to the eligibility of the site selected and as to the dangers to which the children would be exposed while attending the school.

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Constitution, Art. I, sec. 19.

In *Groves v. Ware,* 182 N. C., 553, it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute.

The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. *Comrs. v. George,* 182 N. C., 414; *Corporation Commission v. R. R.,* 170 N. C., 560; *Porter v. Armstrong,* 134 N. C., 447; *Ledbetter v. Pinner,* 120 N. C., 458; 43 L. R. A., 56; 16 R. C. L., 224. The judgment is

Affirmed.

R. H. HUNSUCKER AND R. T. COX, TRADING AS A. G. COX MANUFACTURING COMPANY, v. R. J. CORBITT, CORBITT BUGGY COMPANY, N. H. CARTER, M. W. TEACHY, AND HACKETT MOTOR CAR COMPANY.

(Filed 2 April, 1924.)

1. Limitations of Actions—Nonsuit—Costs—Conditions—Statutes.

While, ordinarily, the plaintiffs' cause of action upon simple contract will be barred by the statute of limitations from three years after its accrual, and if nonsuit within that period, from one year thereafter, conditioned upon the payment of the cost in the original action, it may be shown by plaintiff that his failure to pay these costs before commencing his second action upon the same contract was caused by the failure or the delay of the clerk of the Superior Court to let him know the amount thereof, though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. C. S., 415.

2. Principal and Agent—Agent's Declarations—Evidence Aliunde.

Where, as a result from an inquiry from a newspaper advertisement, the plaintiffs have received a letter from the defendants, stating they would send their certain-named agents to negotiate with them for the

sale of automobiles in a local territory, and soon thereafter two men approached the defendant, representing themselves by the same names as the ones spoken of in the defendants' letter, it is sufficient evidence *aliunde* to admit declarations of agency by those representing themselves as such.

3. Principal and Agent—Vendor and Purchaser—Warranty of Agent—Secret Limitations.

Sales agents have implied authority to bind their principals by their warranties of grade and quality of the merchandise they are employed to sell, and secret or unusual limitations of this authority not disclosed to the purchasers is not binding on them.

STACY, J., dissenting.

APPEAL by defendant buggy company from *Horton, J.,* at October Term, 1923, of PITT.

This is a civil action. The plaintiffs allege that they are partners, engaged in the business of buying and selling automobiles, and that the defendant Corbitt Buggy Company is a corporation, chartered under the laws of North Carolina, and engaged in the business of manufacturing, selling and distributing automobiles throughout the State of North Carolina, and at the time hereinafter set forth was engaged in selling Argo automobiles, with the exclusive right to appoint agents for said car in the State; that on or about 3 May, 1916, the defendant entered into a contract with plaintiff to purchase twenty-five Argo cars and have exclusive right for Pitt County. Prices of the different cars were fixed in the contract, and the contract to remain in full force and effect until 21 July, 1917. The privilege was to order the twenty-five cars from time to time during the existence of the contract. "The plaintiffs entered into said contract in consideration of the representations, warranties and guarantees then and there made to them by the defendant that said cars were 'right, mechanically and artistically, and were dependable, efficient, economical, durable, and suitable for the purposes for which they were intended, to wit, operation and traffic upon the roads of Pitt County and elsewhere,' representing and guaranteeing that said automobiles were built of the best material, of standard equipment; and in further consideration of the assurance by the defendant that it would make good any deficiency or deficiencies that might develop in said cars on account of any inherent defects therein." That in consideration of the stipulations, warranties and guarantees, etc.; the plaintiff paid defendant $125, and made an order for six Argo cars, at a cost to them, f. o. b. the factory, of $2,335, which they received and paid for; that after the receipt of the cars, they proceeded to put them on the market, under the same warranties, etc., that they had taken from defendant; that the cars proved to be worthless, unfit for service, and mere junk, and not up to guarantee, and plaintiffs had to protect

their guarantee and refund to purchasers the purchase price received for the cars; that they made demand on defendants to make good the warranty, which they failed to do; that by reason of the breach of contract they were damaged for loss of profits, extra labor and material in trying to make the cars good, etc., and amount paid for cars in the total sum of $3,438.94. "That an action was originally instituted against the defendant herein on 13 March, 1917, which said action was nonsuited at the March Term, 1920, of Pitt Superior Court, said action having been instituted to recover of the defendant the damages as above set forth."

The defendant Corbitt Buggy Company answers and denies that it made any contract with plaintiffs, and whatever contract was made, it was entered into by plaintiffs with the Argo Motor Company and the Hackett Motor Car Company, the successor to the business and contracts of the Argo Motor Company; that in a former suit brought by plaintiffs against the Corbitt Buggy Company, R. C. Corbitt, and the Hackett Motor Car Company, the plaintiffs set forth in their complaint "That the defendant, the Hackett Motor Car Company, is a corporation, with central office in Jackson, Michigan, organized and existing under the laws of the State of Michigan, and, as such, is the successor to the business and contracts of the Argo Motor Company, with whom the plaintiffs made this contract, a corporation which originally manufactured what is known as the Argo motor car or automobiles, and afterwards sold and transferred all of its rights, contracts, responsibilities, and property to the Hackett Motor Car Company, who have accepted and assumed the same, among them being the plaintiffs' contract." That the plaintiffs attached to the complaint in that action, upon which this action is based, their agreement with the Argo Motor Company. The Corbitt Buggy Company denies that any representations, guarantees or warranties, etc., were made by it; that the only contract plaintiff made was with the Argo Motor Company, or its successor, the Hackett Motor Car Company. It denies that it owes plaintiffs anything. It further says: "That an action was originally instituted against this answering defendant and R. J. Corbitt, individually, and the Hackett Motor Car Company in the Superior Court of Pitt County, on 13 March, 1917, and that said action was nonsuited at the March Term, 1920, of Pitt Superior Court, Hon. G. W. Connor, judge presiding; that it is admitted that this action was instituted against this answering defendant by the issuance of a summons from the Superior Court of Pitt County on 5 May, 1920, and that the same was served on the defendant Corbitt Buggy Company on 10 May, 1920."

For a further defense the Corbitt Buggy Company says "that the plaintiff should not have or maintain this action against this defendant,

for the reason that more than three years have elapsed since the alleged cause of action of the plaintiff against this defendant accrued, and this defendant pleads said lapse of time in bar of any recovery in this action; that this defendant in no wise warranted or became responsible in any manner to the plaintiff by reason of the plaintiff's contract with the Argo Motor Company, and on the contrary this defendant acted only as the distributor for the Argo Motor Company, and this defendant denies that it in any wise contracted with the plaintiff for the delivery of automobiles, but that the contract complained of was entered into between the plaintiff and the Argo Motor Company, and this defendant is in no wise responsible for any alleged deficiency which may have arisen by reason of said contract, and in no wise warranted or assumed any obligation concerning the said contract. Wherefore, having fully answered, this defendant prays that it go hence without day and recover its costs."

After the jury had been duly impaneled, the defendant Corbitt Buggy Company moved for judgment as of nonsuit, for that the plaintiffs' alleged cause of action is barred by the three-years statute of limitations, as appears from the pleadings, and for that the plaintiff had not paid the cost in a prior suit between the same parties upon the same alleged cause of action before the bringing of the present action; and the defendants R. J. Corbitt, N. H. Carter, and M. W. Teachy demurred to the complaint, for that no cause of action was alleged in the complaint as to either of the last-named defendants. The court sustained the demurrer of the defendants R. J. Corbitt, N. H. Carter, and M. W. Teachy, and dismissed the action as to them. It is immaterial, but the record shows no service of process on the defendant Hackett Motor Car Company.

The following issues were submitted to the jury, and their answers thereto:

"1. Did the plaintiff execute the contract for the purchase of twenty-five automobiles, referred to in the pleadings, upon the representations and warranties of the defendant (Corbitt Buggy Company), as alleged in the complaint? Answer: Yes.

"2. Were said representations and warranties false, as alleged in the complaint? Answer: Yes.

"3. If so, what damages is plaintiff entitled to recover of the defendant? Answer: $3,000. No interest.

"4. Is plaintiff's cause of action barred by the statute of limitations? Answer: No."

The exceptions and assignments of error of defendant are 56 in number. The material ones and facts necessary for the decision of the case will be considered in the opinion.

S. J. Everett and Albion Dunn for plaintiffs.
Lewis G. Cooper and Skinner & Whedbee for defendants.

CLARKSON, J. The defendant's first grouping of assignments of error relates to exceptions 1 and 55. "The court committed error in overruling the motion made by the defendant Corbitt Buggy Company for a judgment as of nonsuit, for that the plaintiffs' alleged cause of action is barred by the three years statute of limitations, as appears from the pleadings, and for that the plaintiffs had not paid the costs in a prior suit between the same parties upon the same alleged cause of action before bringing the present action." "The court charges you, if you believe all the evidence, you will answer that issue (4th issue) 'No.'" That issue is as follows: "Is plaintiffs' cause of action barred by the statute of limitations?"

These exceptions raise the plea of the statute of limitations. This defense, three years statute of limitations, was set up in the answer. If the position of defendant can be sustained, the plaintiffs cannot recover.

An action was brought by plaintiffs against R. J. Corbitt, individually, Corbitt Buggy Co. and the Hackett Motor Car Co. in the Superior Court of Pitt County on 13 March, 1917, and this action was nonsuited at the March Term, 1920, of Pitt County. The present action was commenced 5 May, 1920, and the summons served on defendant Corbitt Buggy Co. on 10 May, 1920.

C. S., 415, is as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in *forma pauperis.*"

It was admitted that the costs in the original suit was not paid until 9 May, 1922, about two years after the institution of the second suit, but the second suit was brought within one year after nonsuit of the original suit. At the time the second suit was instituted more than three years had elapsed since plaintiffs' cause of action has accrued. It was necessary for plaintiffs, after the nonsuit in the first action, to bring their second action within one year. Under C. S., 415, *supra, "if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis."*

This cost must be paid or some good cause shown. Plaintiffs contend that the testimony of R. T. Cox, one of plaintiffs, shows, and it is not denied, that he tried to pay the costs on several different occasions, and the clerk did not have the bill of cost made up. "That he went to Mr. Harrington (the clerk) and asked him if he had gotten the cost figured up yet. That he (Harrington) was busy at that time and that he said 'I will mail it to you,' and that he (witness) said, 'We will have to pay the cost before we can start a new suit, and Mr. Everett wants to start it now.' He (Harrington) said, 'I will make the entry on it and you can mail me a check for it,' and that he, the witness, left. That he was ready to pay it then; that he thinks that he had a blank check in his pocket; that as soon as he did call on him for it that he mailed him a check for it." The clerk testified that Cox came to his office before the summons in the second suit was issued; "that at the time he did not have the cost figured up and that he told him that if he would get it up and send him a statement he would pay it." The clerk further testified:

"Q. Mr. Harrington, at the time Mr. Cox tendered you this cost, you considered it as good as paid at that time, and if there had been any demand made by anybody for the cost you would have paid it and called on him for it? Answer: Oh, yes, I knew it was just as good as if I had it; all he wanted was the bill. . . . That he knew that the cost from Cox Mfg. Co. or from A. G. Cox was absolutely good at any time."

It is contended by plaintiff that he did all a reasonably prudent man could be expected to do; that he tried time and time again to get the bill of cost from the clerk and the delay was no fault of his but the clerk's in not making up and letting him have the bill of cost, which he went to pay and tried to pay before the present suit was instituted and within the year, and he had assurance from the clerk, "I will make the entry on it and you can mail me a check for it." That this was tantamount to payment. That it was the clerk's fault and not his. We think there was no error in the charge. The facts in this case are different from *Rankin v. Oates,* 183 N. C., 517, relied on by defendant.

Succinctly the admitted testimony was: "That the clerk would figure the cost up and send him a statement and that he would pay it. . . . I knew it was just as good as if I had it. All he wanted was the bill. . . . I will make the entry on it and you can mail me a check for it."

The defendant's second grouping of assignments of error relate to exceptions numbers 4 to 20, inclusive, and 22 to 40, inclusive, covering alleged errors committed by the court in allowing the introduction of evidence on the part of appellant tending to show the agency of the witnesses, Carter and Teachy, by their declarations, and failing to show

anywhere in the evidence that Carter and Teachy were authorized to make any such representations or to in anywise bind the appellant.

These assignments of error raise the questions: How far an agent can bind his principal, and what evidence is sufficient to prove agency?

The evidence on the part of plaintiffs was that they first saw the Argo car advertised in the News and Observer; that they had some correspondence with Mr. Corbitt, of the Corbitt Buggy Co., the defendant in this action; that they received a catalogue and the following letter signed "Corbitt Buggy Co., R. J. Corbitt, V. P." dated Henderson, N. C., 21 April, 1916. The letter is as follows:

"We have your esteemed favor of the 19th instant, and we are pleased to enclose herewith catalogue of the Argo automobiles.

"The terms are spot cash on these automobiles, and the list price of the runabout is $385, and it costs you $335; the list price of the touring car is $435, and it costs you $375; the list price of electric lights and electric starter is $60 extra, and they cost you $55 extra.

"We require each agent to sign a contract and put up a deposit of $125, and we give him the exclusive right of selling Argo cars in the county in which he is located.

"This is a popular priced car and there are lots of them being sold. If you have never seen one of these cars, you can come up to Henderson and see them.

"Above prices are F. O. B. Jackson, Mich. We can deliver these cars from Henderson, but in that case you would have to pay the freight from Jackson, Mich., to Henderson, which would be about $25, and you can drive through the country from Henderson to Winterville, or you can have them shipped in carload lots from Jackson, Mich.

"If you are interested we will have our representative, Mr. N. H. Carter, or M. W. Teachy call on you at once, or we will be glad to have you come to Henderson."

The letter was admissible. *Edwards v. Erwin,* 148 N. C., 430.

After having received the letter, two men called on plaintiff—Teachy and Carter. They said they represented the Corbitt Buggy Co. "They said they were sent down to close the contract." Then Teachy and Carter made in substance the representations, warranties and guaranties set forth in the complaint, and on these representations, etc., plaintiffs purchased the cars and signed the contract. The evidence was to the further effect that the cars would not run and in substance were worthless and unfit for service. That the Corbitt Buggy Co. was notified of these defects. That parties representing themselves as coming from the defendant, Corbitt Buggy Co., came to try and work on the cars to overcome the various troubles.

We think these exceptions cannot be sustained. There was sufficient evidence introduced by plaintiff to lay the proper basis for its admission that Teachy and Carter were agents of defendant Corbitt Buggy Co. The facts and circumstances show some evidence *aliunde* than the declarations of the alleged agents.

"Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ,* but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admissions will be received." Lockhart's Handbook on Evidence, sec. 154, citing: *Williams v. Williamson,* 28 N. C., 281; *Munroe v. Stutts,* 31 N. C., 49; *Royal v. Sprinkle,* 46 N. C., 505; *Grandy v. Ferebee,* 68 N. C., 356; *Francis v. Edwards,* 77 N. C., 271; *Gilbert v. James,* 86 N. C., 244; *Johnson v. Prairie,* 91 N. C., 159; *Taylor v. Hunt,* 118 N. C., 168; *Summerrow v. Baruch,* 128 N. C., 202; *Daniel v. R. R.,* 136 N. C., 517. See, also, *Morgan v. Benefit Society,* 167 N. C., 266; *Realty Co. v. Rumbough,* 172 N. C., 747.

We think that the representations, etc., of Teachy and Carter were in the scope of their employment and binding on defendant. *Powell v. Lumber Co.,* 168 N. C., 635; *Lumber Co. v. Johnson,* 177 N. C., 51; *Furniture Co. v. Bussell,* 171 N. C., 485; *Strickland v. Kress,* 183 N. C., 536; *Fisher v. Lumber Co.,* 183 N. C., 490; *Crutchfield v. Rowe,* 184 N. C., 213; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 214.

Nash, J., in *Hunter v. Jameson,* 28 N. C., 255, says: "They establish conclusively that, in every general agency by parol, the agent has authority to bind his principal by a warranty." In that case the agent sold clocks, and it was held he could warrant them as being in the scope of his authority and connected with the act of the sale, and it was not necessary to show that the agent was expressly instructed to warrant them. *Alpha Mills v. Engine Co.,* 116 N. C., 802.

Power to sell usually includes power to make such warranties as are customary in that place and business. Thus in sale of personalty, power to warrant quality is implied from power to sell as to such warranties as are customary. Page on the Law of Contracts (2 ed.), Vol. 3, p. 3004; *Mfg. Co. v. Davis,* 147 N. C., 267. As to implied warranty, see *Grocery Co. v. Vernoy,* 167 N. C., 428.

The case was tried on the contentions given by the court below which are, in part, as follows:

"Plaintiff contends that when these men came down here they had a right to rely upon the fact that they were authorized by the Corbitt Buggy Co. to make these representations. They contend that they were acting in the scope of their apparent authority when they made these

representations; that the Cox Mfg. Co. did not know Mr. Corbitt had told them not to make these representations; they had the right to rely upon the fact that they had authority to make them and that they were acting, not only in the scope of their apparent authority, but actual authority. Plaintiff contends apparent authority is to do what is necessary to be done in order to carry into effect the purpose for which they were sent down there, and that you should therefore find from this evidence, by its greater weight, not only that these representations were made to them and relied upon, but that these men were acting in the scope of their authority and did bind Corbitt Buggy Co., and that you should answer the first issue 'Yes.' (This issue was as follows: Did the plaintiff execute the contract for the purchase of 25 automobiles referred to in the pleadings, upon the representations and warranties of the defendant, as alleged in the complaint?)

"On the other hand, defendant, Corbitt Buggy Co., contends you ought not to find that any such representations were made as to the Cox Mfg. Co. by it as principal or by anybody who had authority to bind it. They say that these representations were not made; that Cox Mfg. Co. wanted to buy a cheap automobile and picked these out because they were cheap, and that they ought not to have expected to have gotten a great deal for so little money as that; that some correspondence took place and they advised Cox Mfg. Co. that they were distributors before any representation that might have been made was binding upon them as agent, but only upon their principal, the Argo Motor Co.

Corbitt Buggy Co. contends that it was merely an agent; that while it may have had a little commission, that would not bind them; but they contend that Carter and Teachy made no such representation as testified to by some of the witnesses in this case; that they merely went down there, and that they had been sent a folder or circular, and that Cox and Hunsucker had read this circular and had made up their minds to buy them when Carter and Teachy got down there; that they did not guarantee the automobile at all, and that they did not say the Corbitt Buggy Co. would stand behind any of these automobiles, and that you should find that no such representations were made; that even if you find Carter and Teachy made these representations, that you ought to further find they were not acting in the scope of their authority; that Cox Mfg. Co. ought to have known, by the exercise of reasonable foresight and prudence, that it was only an agent and that Carter and Teachy had no authority to guarantee these automobiles at all, and that when you come to consider this you will find they signed the contract and paid the money and that their remedy would be against the Argo Motor Co., the one who sold these automobiles as principal to the Cox Mfg. Co.; that even if you find these men made these representa-

tions, that they have both testified they did not have authority to make them and that they were not acting in the scope of their apparent authority, and that they ought not to be held personally liable for the breach of this contract. They say the contract was made with the Argo Motor Co., and that nowhere does the name of Corbitt Buggy Co. appear except where it says the Corbitt Buggy Co. was distributor of this automobile, and that Teachy and Carter were only acting as agents of the Argo Motor Co. in this business, and contends that from all the evidence you ought not to be satisfied by the greater weight of the evidence that they are personally liable for any warranty or guaranty and that you should answer this issue 'No.' "

The 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 groupings of assignments of error include the other exceptions taken by defendant, Corbitt Buggy Co. The 14th grouping of assignments of error covers the defendant's 55th exception, which has been considered under the first grouping of assignments of error.

We see no error in the charge on apparent authority or the question of damages. It will be noted that the verdict was for less damages than claimed by plaintiffs. If error on the question of profit, it was not prejudicial.

We can see no prejudicial or reversible error in these assignments, under the theory and law as we construe it, on which this case was tried. The questions are mainly facts which were for the jury to pass on. It may be a hardship on the defendant, but that was a matter for the court below and the jury. We can only pass on matters of law or legal inference in cases of this character.

We have gone through the record and considered carefully the argument and well-prepared briefs of counsel, and can find

No error.

STACY, J., dissents.

GEORGE E. KIDDER, EXECUTOR OF KARIN D. BAILEY, DECEASED, v. MRS. CHARLOTTE P. BAILEY, GUARDIAN OF CLARICE BAILEY AND EDWARD P. BAILEY, MINORS UNDER THE AGE OF FOURTEEN YEARS.

(Filed 2 April, 1924.)

1. Wills—Intestacy—Presumptions.

While there is a presumption that a testatrix intended to dispose of her entire estate by will, it must give way when by the plain language of the will it appears by its interpretation as a whole that she omitted from the will a part of her estate, as to which she had died intestate.

2. Same—Descent and Distribution.

Where the testatrix died seized of an inheritance derived from her mother, consisting of lands, stocks, etc., and also of an estate or property otherwise so held, and devised all of the property derived by her from her mother and other certain shares of stock to her two sisters, without residuary clause or other disposition by her will, interpreting the will as a whole, *it is held* that by the clear language of the will, admitting of no extrinsic aid of interpretation, she died intestate as to all property not derived by her from her mother except the stock named, and the residue of her estate descended upon her heirs at law.

CIVIL ACTION tried before *Cranmer, J.,* at October Term, 1923, of NEW HANOVER. Appeal by defendants.

E. K. Bryan for plaintiff.
Bellamy & Bellamy and Rountree & Carr for defendants.

CLARKSON, J. Karin D. Bailey died in New Hanover County on 14 September, 1921. At the time of her death she left surviving her two sisters (1) Virginia Bailey Chisolm and (2) Frances Bailey Kidder, and Clarice Bailey and Edward P. Bailey, infants under 14 years of age, only children of her brother, Edward P. Bailey, deceased. She left a will, and the plaintiff, Geo. E. Kidder, is the sole executor. The other executor appointed, Walter N. Storm, declined to qualify.

This was a holograph will made by Karin D. Bailey, and is as follows:

"27 December, A. D. 1919.

"Last will and testament of Karin Dahlstrom Bailey.

"I leave and bequeath to my two sisters, Virginia Bailey Chisolm and Frances Bailey Kidder, all of my interest in the estate of my mother (Annie Empie Bailey) including all real property, stocks and bonds, and all of my interest in the Wilmington Iron Works, to be divided equally between them, share and share alike, except as hereinafter noted.

"I leave and bequeath to my sister Frances Bailey Kidder my gold ring with three diamonds, for her lifetime, at her death to go to my niece, Virginia Empie Chisolm—if my sister Frances B. Kidder has not a daughter named Ann Empie Kidder.

"I leave and bequeath to my friend, May Houston, five hundred dollars ($500) and my gold wrist watch.

"I leave and bequeath to my friend, Sarah Jackson Storm, five hundred dollars ($500).

"I leave and bequeath to my friend, Sara L. Maffitt, all my bureau silver.

"I ask that my brother-in-law, George E. Kidder, and my friend, Walter W. Storm, act as my executors, and that no bond be required of them.

KARIN D. BAILEY."

It appears from the language of the whole will that Karin D. Bailey was a woman of more than ordinary intelligence. She had real and personal property other than what she received from the estate of her mother, Annie Empie Bailey. She received from her mother's estate real property, stocks and bonds. The sole question presented to this Court is whether her will to her two sisters not only included the estate received from her mother but all other property she owned at her death. If this was the language and intent of the will, the whole estate went to her two sisters and the two children of her deceased brother, Edward P. Bailey, defendants in this action, get nothing.

The portion of the will that the contention is over is as follows: "I leave and bequeath to my two sisters, Virginia Bailey Chisolm and Frances Bailey Kidder, all of my interest in the estate of my mother (Annie Empie Bailey), including all real property, stocks and bonds, and all of my interest in the Wilmington Iron Works, to be divided equally between them, share and share alike, except as hereinafter noted."

It is agreed by the counsel for the contending parties, and it is the law, that it is an established rule of law that the presumption is, when a party makes a will that he disposes of his entire estate, and so intends. *Allen v. Cameron,* 181 N. C., 120; *Austin v. Austin,* 160 N. C., 367; *Peebles v. Graham,* 128 N. C., 225; *Blue v. Ritter,* 118 N. C., 580; *Reeves v. Reeves,* 16 N. C., 386.

Usually there is a residuary clause in a will which generally deals with all property not before disposed of in the will. In the will under consideration there is no such clause.

From the record—in the judgment—it appears, "It was admitted that Karin D. Bailey had some property which she inherited from her mother and that she had other property that was not inherited from her mother, in addition to her interest in the Wilmington Iron Works."

"There is a cardinal rule, also, that the heir should not be disinherited except by express devise or by one arising from necessary implication, by which the property is given to another, though the right of the testator to omit the heir from his will is not to be denied or curtailed." Underhill on Wills, sec. 466; *Dunn v. Hines,* 164 N. C., 117.

The true rule is laid down by *Adams, J.,* in *McIver v. McKinney,* 184 N. C., 396, where it is said: "The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety. *Patterson v. Wilson,* 101 N. C., 586 *Francks v. Whitaker,* 116 N. C., 518; *Chewning v. Mason,* 158 N. C., 579; *Dunn v. Hines,* 164 N. C., 114; *Taylor v. Brown,* 165 N. C., 157; *McCallum v. McCallum,* 167 N. C., 310."

This rule should always be followed, especially when it is consonant with justice and natural affection. Did the testatrix intend to exclude from her will the infant children of her deceased brother? If she did she could in clear language have said so. The will indicates that the testatrix was a woman of more than ordinary sense and ability; her English and language, and the whole will, indicate that she was a woman of education. What is her language? "I leave and bequeath to my two sisters, Virginia Bailey Chisolm and Frances Bailey Kidder, *all of my interest in the estate of my mother* (italics ours) (Annie Empie Bailey), including all real property, stocks and bonds, and all of my interest in the Wilmington Iron Works, to be divided equally between them, share and share alike, except as hereinafter noted." She does not convey *all of her property* but *"all of my interest in the estate of my mother,"* and names her mother (Annie Empie Bailey), so there could be no mistake as to the estate, and then she names what the estate consists of, "including all real property, stocks and bonds." She had an interest in the Wilmington Iron Works and when she comes to that—all of that must go to these two sisters, "and *all* of my interest in the Wilmington Iron Works," then comes "to be divided equally between them, share and share alike, except as hereinafter noted." Then comes minor bequests to other parties.

There is no ambiguity about the will, the language is plain and means what it says—that the testatrix left to her two sisters, Virginia Bailey Chisolm and Frances Bailey Kidder, all of her interest in the estate of her mother, Annie Empie Bailey, and all of her interest in the Wilmington Iron Works. As to her other property she died intestate, and Clarice and Edward P. Bailey, infant children of her deceased brother, Edward P. Bailey, are entitled, as heirs at law, to their share in any other property that Karin D. Bailey died seized and possessed of.

We conclude that, by the proper construction of said will, the said Karin D. Bailey died intestate as to all of her property, except that which she owned in the Wilmington Iron Works, and also as to that which she derived from the estate of her mother, and the appellant's wards, as heirs at law and distributees, by reason of being the children of Edward P. Bailey, deceased, brother of Karin D. Bailey, are entitled to share pro rata with Virginia Bailey Chisolm and Frances Bailey Kidder in the distribution of all of the property of which she died intestate.

Where the language is clear as to the intent of the testator and there is no latent ambiguity, there can be no extrinsic proof.

In *McDaniel v. King*, 90 N. C., 602, *Merrimon, C. J.*, said: "If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing

passes, that is sufficient, and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it." *Williams v. Bailey,* 178 N. C., 632.

From the view we take of this case we think there was

Error.

IN RE JOHN COSTON AND ELLEN COSTON, MINORS.

(Filed 2 April, 1924.)

1. Juvenile Courts—Judgments—Appeal and Error—Statutes.

Public Laws of 1919, now C. S., ch. 90, art. 2, secs. 5-39 *et seq.*, are valid constitutional provisions for the uncared for and destitute children of the State under certain administrative and judicial powers conferred upon the clerks of the Superior Court, etc., as juvenile courts with power to initiate and examine and pass upon cases coming within the statutory provisions, and where, following the statutory procedure, these juvenile courts have determined and adjudged that a certain child comes within their jurisdiction, such action is within the judicial powers conferred, and fixes the status of the child as a ward of the State, and the condition continues until the child becomes of age, unless and until such adjudication is modified or reversed by further judgment of the juvenile court or by the judge of the Superior Court hearing the case on appeal as the statute provides. C. S., 5058, 5039, 5054.

2. Same—Habeas Corpus.

The statutory remedy by appeal being provided from the determination of the juvenile court from its judgment that a certain child comes within the statutory provisions, and the status of the child has been ascertained by the juvenile court as being that of a ward of the State, the writ of *habeas corpus* is not available to the parent or other claiming the child, unless in rare and exceptional cases wherein the welfare of the child has not been properly provided for. C. S., 5454.

3. Same—Parent and Child—Notice.

Where the juvenile court has examined into the condition of a child, and has adjudged that the child is of wandering or dissolute parents, and living with its poor and dependent grandparents, who had acquiesced in the investigation and its results, it is unnecessary to the valid adjudication fixing the child as a ward of the State and taking its custody accordingly, that the parents should have been notified to be present at the investigation, though such course is to be commended when the child is living with its parents or under their control, or are living at the time within the jurisdiction of the court. C. S., 5046, 5047.

4. Same—Jurisdiction—Conflict of Courts.

Where the parent of a child that has been adjudicated a ward of the State under the statute relating to juvenile courts afterwards claims the possession of the child, the procedure requires that she make application to the juvenile court that had adjudicated the matter in order to avoid conflict and uncertainty as to the status or condition of the child, to the end that an investigation be made of the circumstances in the course and practice of the courts.

HABEAS CORPUS proceedings instituted on petition of Mrs. Dolly Ruth Fuller for possession and control of her two minor children (John and Ellen Coston) by a former husband, and heard before his Honor, *Grady, J.*, at Raleigh, N. C., on 11 January, 1924. From the pleadings, admissions, affidavits and exhibits in the cause and recognized as trustworthy evidence in his Honor's judgment, it appears that at the time of the proceedings instituted and writ served, the two children, aged respectively 11 and 8 years, were in the care and keeping of respondent, John J. Phoenix, as superintendent of the North Carolina Children's Home Society, Inc., at Greensboro, N. C., not a State institution but one for the care of such children, duly approved for the purpose by the State Board of Charities and Public Welfare, and that they had school facilities and were otherwise well provided and cared for and were so placed under a decree of the juvenile court of Duplin County, entered, after full investigation, on 21 June, 1923, and in which these children were adjudged to be dependent and neglected and were ordered to be placed at said institution, and under the rules and regulations thereof, as wards of the court and subject to its further orders as their well-being might require.

That at the time of this decree entered, and for a long time prior thereto, the former husband and father of these children had left his wife and his whereabouts was unknown. That the mother had for quite a while been roaming about in a questionable manner, and at the time of said investigation she was living in improper association with her present husband, a corporal in the U. S. Army, moving from place to place, in Baltimore and elsewhere, claiming that they were married. That petitioner was not divorced from her former husband until August, 1923, after present decree entered. The children at the time of the hearing had before the juvenile court were making their home in Duplin County with their grandparents, Mr. and Mrs. Tobe Tucker, very poor people, the father being an inefficient person, having an allowance from the county of Duplin as a pauper, and the grandmother dependent on the aid of others, and the children were not sufficiently clothed or fed or cared for.

That these conditions were the subject of concern to the welfare officer of the county, and after conference with the grandparents, a warrant

was issued and served on the children, and they were brought before the juvenile court, attended by their grandmother; their condition was fully examined into, and the court finding that they were both dependent and neglected children within the meaning of the Juvenile Court Act, being article 2, chapter 90, it was so adjudged, and that as wards of the court they be committed to the institution at Greensboro, where they now are.

That on the morning of their departure to the institution they were brought to the train by their grandmother, with whom they resided, etc.

There was also evidence at the hearing for the petitioner tending to show, and his Honor so finds, that no summons had been served on either of the parents of the children prior to the investigation before the juvenile court, and that neither of said parents were present, and that the petitioner was *now* a suitable person to have charge of her children, and it was thereupon adjudged that the proceedings before the juvenile court were altogether null and void, and that, "subject to the supervision and oversight of the courts of North Carolina, or wherever they may reside," the respondent John J. Phoenix within the next sixty days deliver said minor children to the petitioner.

To which said judgment respondent excepts and appeals to the Supreme Court.

Fowler, Crumpler & Butler for petitioner.
Rivers D. Johnson for respondent.

HOKE, J. In 1919 the General Assembly enacted a statute known as the Juvenile Court Act, making provision for the care and control of the delinquent and dependent and neglected children of the State, substantially as it now appears in chapter 90, article 2, of the Consolidated Statutes, secs. 5039-5067, inclusive. The statute, after conferring exclusive jurisdiction of the general subject on the Superior Courts of the State, for the more efficient administration of its provisions has established juvenile courts in every county as separate parts of the Superior Court, constituting the clerks of the Superior Courts as judges of the juvenile courts, with provisions for establishing additional juvenile courts for the larger cities and towns. The validity of the statute has been upheld, and many of its provisions construed and applied in *S. v. Burnett,* 179 N. C., 735; *S. v. Coble,* 181 N. C., 554; *In re Hamilton,* 182 N. C., 44, and other cases.

From the principles approved in these decisions and in further consideration of the statute and its terms and purpose, it appears that the law has primarily conferred upon these juvenile courts the power to initiate and examine and pass upon cases coming under its provisions. That these powers are both judicial and administrative, and when,

having acquired jurisdiction, a juvenile court has investigated a case and determined and adjudged that the child comes within the provisions of the law and shall be controlled and dealt with as a ward of the State, this being in the exercise of the judicial powers in the premises, fixes the status of the child, and the condition continues until the child is of age, unless and until such adjudication is modified or reversed by a further judgment of the court itself or by the Superior Court judge hearing the cause on appeal as the statute provides. C. S., 5039-5054. And *Brickell v. Hines,* 179 N. C., 254, is in support of the general principle.

Doubtless if it should be made to appear that in the administrative features of the law the child is being neglected or subjected to such cruelty, etc., as to require immediate action, the Superior Court, in the exercise of its supervisory powers, may interpose for its relief, but unless so provided for by statute, the writ of *habeas corpus* is not ordinarily allowed as a substitute for an appeal, and where an appeal lies, such course should be pursued. As said in the opinion in the case of *In re Hamilton, supra,* "The supervision and oversight of the Superior courts should be exercised in an orderly way by appeal from the juvenile court where such is provided by statute, and otherwise by appropriate writ where no appeal is available."

In the present case there is no complaint as to the administrative features of the law, nor any suggestion that the child is not being wisely and properly cared for in its present home; and as to the adjudication of the juvenile court fixing the status of the child as a ward of the State, there is ample provision in the statute, and at any time, for either a modification or reversal of the judgment, and for an appeal to the Superior Court in case the application is denied. Thus, in section 5054 of the law, it is provided:

"*Modification of Judgment; Return of Child to Parents.* Any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of such child, except that a child committed to an institution supported and controlled by the State may be released or discharged only by the governing board or officer of such institution.

"Any parent or guardian, or, if there be no parent or guardian, the next friend of any child who has been or shall hereafter be committed by the court to the custody of an institution other than an institution supported and controlled by the State, or to the custody of any association, society or person, may at any time file with the court a petition verified by affidavit setting forth under what conditions such child is living, and that application for the release of the child has been made to and denied by such institution, association, society or person, or that

institution, association, society or person has failed to act upon such application within a reasonable time. A copy of such petition shall at once be served by the court upon such institution, association, society or person, whose duty it shall be to file a reply to the same within five days. If, upon examination of the petition and reply, the court is of the opinion that an investigation should be had, it may, upon due notice to all concerned, proceed to hear the facts and determine the question at issue, and may return such child to the custody of its parents or guardian, or direct such institution, association, society or person to make such other arrangements for the child's care and welfare as the circumstances of the case may require.

"Any child, while under the jurisdiction of the court, shall be subject to the visitation of the probation officer or other agent of the court authorized to visit such child."

And in the closing portion of section 5055, "In any case arising under this article the court (juvenile court) may determine as between parents or others whether the father or mother, or what person shall have the custody and direction of said child, subject to the provisions of the preceding sections." And the right of appeal from an adverse ruling on these applications is directly provided for in section 5058.

And we do not concur in the view that the proceedings in the juvenile court of Duplin are void because no notice was served on either parent. When the child is living with its parents or under their control, and they are at the time within the jurisdiction of the court, such notice should always be given, and even when beyond the jurisdiction, it is provided that notice shall be sent them by registered mail, but a perusal of the portions of the law more directly applicable will clearly disclose that such service is not always essential, and in our opinion, on the facts presented in this record, the service as made should be held sufficient, and the court had full jurisdiction of the case. The welfare of the child being the controlling feature of such an investigation, it was never contemplated that a court charged with the duty should be powerless to proceed because its parents could not be readily found, or should prove utterly inefficient and untrustworthy. Accordingly, in sections 5046 and 5047 of the statute it is, among other things, provided:

"In case the summons cannot be served or the party fails to obey the same, and in any case when it shall be made to appear to the court that such summons will be ineffectual, or that the welfare of the child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued on the order of the court either against the parent or guardian or other person having custody of the child or with whom the child may be, or against the child himself. The sheriff or other lawful officer of the county in which the action is taken shall serve

all papers as directed by the court, but the papers may be served by any person delegated by the court for that purpose.

"Upon the return of the summons or other process, or after any child has been taken into custody, at the time set for the hearing the court shall proceed to hear and determine the case in a summary manner."

Considering the record in view of these, the statutory provisions applicable, it appearing that at the time of the hearing and of service had the whereabouts of the father of the child was unknown; that the mother was living in questionable relations with her present husband, and moving from place to place, and at this time seems to have been out of the State; that the grandparents with whom the child was residing were inefficient people, especially the grandfather, who had a pauper's allowance from the county of Duplin, and both he and his wife were themselves dependent upon others, and comparatively helpless; and the record showing further that, pursuant to the statutory provision, a warrant was issued and served on both of the children, who were produced and present at the hearing, accompanied by their grandmother, who was also present, and that the latter, after the decree, herself brought the children to the train to be taken to the home to which they had been committed, we are of opinion as stated that the juvenile court of Duplin had full jurisdiction of the cause; that its adjudication holds until reversed or modified as the law requires (on application made directly to that court), and that his Honor therefore was without power to direct the discharge of these children in *habeas corpus* proceedings.

On the facts of this record, if the mother desires to have the decree reversed, as stated, and the children restored to her, she should apply to the juvenile court of Duplin, where the matter may be fully investigated and the decision reviewed on appeal, according to the course and practice of the court, and as the right and justice of the case may require. And without intimation as to how the case should be decided, we deem it not improper to say that in the administration of this or any other portion of this beneficent statute, the parental right should always be given full consideration. Speaking to this question and to the spirit in which the law should always be administered, the Court, in *Burnett's case,* said:

"And if the guardianship of the child is taken over by the State they are allowed, on proper application, at any time to have their child brought before the court, its condition inquired into, and further orders made concerning it except, as shown, when committed to a State institution, and then they may apply directly to the Superior Court. And in any sane and just administration of this measure, the family relationship and this parental right, which are at the very basis of our social order and among its chiefest bulwarks, must always be given full consideration.

"Speaking to this question in 20 R. C. L., 601-602, quoted with approval in *Means' case,* 176 N. C., 311, the author says: 'The natural affection of parents is ordinarily the best assurance of the child's welfare, and the object to be sought for the child is not so much the luxury and social advantages, which more wealthy guardians might be able to give it, as the wholesome, intellectual and moral atmosphere likely to be found in its natural home.' But this right and relationship, important as it is, is not absolute and universal, and may be made to yield when it is established that the welfare of the child and the good of the community clearly requires it. This has been held with us in numerous decisions concerning the disposition of children under the general principles of the common law and equity prevailing in this State. *In re Warren,* 178 N. C., 43; *In re Means,* 176 N. C., 307; *Atkinson v. Downing,* 175 N. C., 244; *In re Fain,* 172 N. C., 790. And, undoubtedly, it may be so provided by an act of the Legislature in the well ordered exercise of the police power."

It has been suggested that on a proper perusal of the statute any juvenile court should have the power to examine into and pass upon the conditions of dependent or delinquent children held as wards of the State, but while this may be true as to the administrative features of the law, and the care and placing of such child, we think, in reference to the adjudication fixing the child's position as a ward of the State, the application to modify or reverse should be made to the original court, to the end that in this respect there should be no conflict or uncertainty as to the status and condition of the child.

For the reasons stated, we are of opinion that the judgment of the Superior Court be reversed, and it is so ordered.

Reversed.

PEOPLES UNITED BANK, RECEIVER OF THE BANK OF SOUTHPORT, v. PERCY WELLS AND JAMES HOWARD.

(Filed 2 April, 1924.)

1. Banks and Banking—Officers—Imputed Knowledge—Bills and Notes—Fraud—Principal and Agent.

Knowledge of fraud in the procurement of a note by a president of a bank will not be imputed to a bank when he has acted therein to his own personal advantage, and in which the bank has neither participated nor derived any profit or advantage.

2. Same.

A president of an insolvent bank induced a purchaser for some of his own stock by fraudulently representing that it was worth above par, and to get the purchase-money, sent the purchaser's note therefor to a

subsidiary bank of which he was only a nominal or inactive president, and which was acted upon and accepted and discounted by the officers thereof whose business it was to pass upon such matters, without knowledge or participation in the fraud, the note being payable to the subsidiary bank for which they were acting: *Held*, the fraud perpetrated by the seller of the stock will not be imputed to the subsidiary or purchasing bank, and it may recover thereon.

3. Same—Burden of Proof.

Where fraud is shown in the procurement of a note, in the payee's suit thereon the burden of proof is on the plaintiff to show that he was a purchaser for value, before maturity, and without knowledge of the fraud.

APPEAL by defendants from *Calvert, J.*, at January Term, 1924, of BRUNSWICK.

In May, 1922, the Bank of Southport and the Commercial National Bank of Wilmington were engaged in the banking business in their respective towns. Thomas E. Cooper was president of both banks, residing in Wilmington and devoting his time to his bank at that place. He visited Southport once or twice a year in connection with the affairs of that bank, which sent him statements of its affairs about twice a month. Occasionally the bank at Southport had more cash than it was possible to use and would so notify Cooper at Wilmington, and occasionally he would send to the Southport bank paper for discount which it would sometimes discount, but not always.

In May, 1922, the shares of stock in the Commercial Bank of Wilmington which had stood in the name of W. B. Cooper were transferred to his brother, Thos. E. Cooper. At that time such bank was absolutely insolvent, which fact, as stated in the facts agreed, was known to W. B. Cooper and Thos. E. Cooper, chairman of the board and president respectively of that bank.

The note sued on was given as the purchase price of 50 shares of the capital stock of the Commercial Bank, and was sold by Thos. E. Cooper to the defendant Wells, with the representation that such stock was worth $116 per share. These representations were relied upon by Wells, and he was thereby induced to purchase the stock and make the note signed by himself and endorsed by his codefendant, James Howard. The Southport bank loaned on the note its face value of $5,000 less discount of 6 per cent.

At that time the affairs of the Bank of Southport were actively attended to by the vice-president and cashier, both of whom resided at Southport and who passed upon the acceptance of this note. The note was transmitted to them in a letter from Thos. E. Cooper, who, after describing the note, which he enclosed, stated that it was perfectly good and that Wells and Howard were worth $100,000 net. It is uncontradicted evidence that neither Berg nor Ruark, officers of the South-

port Bank, who discounted the paper, at the time had any knowledge of the insolvency of the Commercial National Bank, nor of the fact that this note had been given by Wells in payment for stock of Commercial National Bank purchased by him from Thos. E. Cooper. The only information they had was that contained in the aforesaid letter of Cooper to the Bank of Southport, which did not inform them of the true condition and circumstances under which the note was taken. The note became due 26 August, 1922, and was renewed for 60 days, and then again renewed on 25 October, 1922, which last renewal is the note in suit.

The jury found upon the issues submitted to them:

(1) Was the note in controversy procured by fraud and misrepresentation as alleged in the answer? Answer: Yes.

(2) If so, had the Bank of Southport, at the time of the purchase of said note, notice of such alleged fraud? Answer: No.

(3) Did the Bank of Southport purchase said note for value and before maturity? Answer: Yes.

(4) What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $5,000, with interest from 24 December, 1922.

The court rendered judgment for that amount in favor of the plaintiff, and the defendants appealed.

Jos. W. Ruark and Ruark & Campbell for plaintiffs.
Bellamy & Bellamy and Rountree & Carr for defendants.

CLARK, C. J. The defendants moved for nonsuit upon the ground that "Thos. E. Cooper was president of the Bank of Southport and participated in the discount of the note by that bank, and any knowledge of any informality in the note or any defense thereto known to him is imputable to that bank, or, more properly, is the knowledge of the bank itself." There is no evidence that Thos. E. Cooper participated in the discounting of the note by the Bank of Southport. It is true that he transmitted the note from Wilmington to that bank with a statement of the entire solvency of the signer and endorser thereof. There is nothing in the record to justify the claim in the defendant's brief that the note was discounted by Thos. E. Cooper with the Commercial National Bank. The note on its face is payable to the bank at Southport.

The court charged the jury that the burden of proof was upon the plaintiff to satisfy the jury, by the greater weight of the evidence, that the Bank of Southport at the time of the purchase of the note had no notice of the fraud, and that it was admitted that Thos. E. Cooper was president of both the Commercial National Bank and the Bank of

Southport; that as said Cooper was at that time president of the Bank of Southport, and sent the note to that bank for purchase, any notice or knowledge he had of the fraud is presumed to be imputed to the bank; that is, it is presumed that the bank had such notice or knowledge of the fraud as its president (Cooper) had, and added the following, which is excepted to: "This presumption would be rebutted, however, if Cooper at the time, and with respect to this transaction, was acting for himself and in hostility to the Bank of Southport, or if, as president of both the Bank of Southport and the Commercial National Bank, he felt such a greater interest in the affairs of the Commercial National Bank, that because of such interest he refrained from informing the other officers of the Bank of Southport of the circumstances of the sale of the stock to Wells and the making by Wells of the note in question."

The defendants also except to the following charge: "The plaintiff further contends that the testimony tends to show that though Cooper was president of the Bank of Southport, yet that it was a personal matter to him, and having committed a fraud in the sale of the stock, that he was then acting, in the matter of the sale of the note to the Bank of Southport, in hostility to the Bank of Southport; or, the plaintiff contends that you should find, if there was a sale of the note by the Commercial National Bank to the Bank of Southport, there is testimony to show that Cooper was favoring the Commercial National Bank, and because of his feeling greater interest in that bank he refrained from giving to Ruark and Berg, the officers of the Bank of Southport, information of the circumstances under which the stock was sold and the note was given."

The record does not disclose any request by the Bank of Southport at or about that time to send down any paper for discount. There is no endorsement shown by the Commercial National Bank of the note in suit.

Ordinarily a bank is presumed to have notice of matters which are known to its president, upon the theory that he will, in the line of his duty, communicate to the bank such information as he has, but the law recognizes the frailty of human nature, and where the president has a personal interest to serve or is acting in a transaction in his own behalf, the presumption does not obtain that he will communicate to the bank matters which are detrimental to him. *Grady v. Bank,* 184 N. C., 162; *Anthony v. Jeffress,* 172 N. C., 381; *Corp. Com. v. Bank,* 164 N. C., 358; *Brite v. Penny,* 157 N. C., 114; *Bank v. Burgwyn,* 110 N. C., 273.

In *LeDuc v. Moore,* 111 N. C., 516, it appeared that Moore was president of the bank and, with the cashier, constituted the discount committee, and actually participated as a member of such committee in discounting the note in question.

Bank v. Burns, 49 L. R. A. (N. S.), 764, also differs from this case in that the payee of the note in that case was president and active manager of the bank; that he sold and discounted the notes to the bank, and in so doing acted for himself personally and as endorsee and also for the bank as its president; that no other officer or person connected with the bank had anything to do with the purchase of the note, and it had no notice or knowledge of any facts that would invalidate said notes in the hands of the president. That case cites *Innerity v. Bank,* 139 Mass., 332, as follows: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he did not communicate the facts in controversy, as where the communication of the facts would have necessarily prevented the consummation of the fraud the agent was engaged in perpetrating."

In *Curtis v. U. S.,* 262 U. S., 215, the agent whose knowledge was imputed to the principal was actively carrying on for the principal the specific work for which the agent had been appointed.

If the Commercial National Bank, of which Cooper was actively the president, had discounted this paper with said bank and transmitted it to the Bank of Southport, the knowledge which he possessed would have been imputed to the bank in Wilmington, but there is no evidence to that effect. It does appear that he was president only in name of the Bank of Southport and did not actively manage the affairs; that he lived in Wilmington, where the Commercial National Bank did business, and only went to Southport once or twice a year in connection with the affairs of the Bank of Southport, to which the paper on its face was made payable.

Upon the evidence the jury might reasonably infer that Thos. E. Cooper "felt such a greater interest in the affairs of the Commercial National Bank, and that because of such interest he refrained from informing the officers of the Bank of Southport of the circumstances of the sale to Wells and the making by Wells of the note in question."

The Commercial National Bank, of which Thos. E. Cooper was the active president and manager, would be fixed with the notice of fraud practiced by him upon the defendants in this connection, but this would not be true as to the Bank of Southport, of which he was only nominally president, and whose affairs, upon the evidence, were managed by its vice-president and cashier.

We think that there is no error in the charge in the particulars referred to. In *Bank v. Burgwyn,* 110 N. C., 267, it was held that a bank was not affected with constructive notice by reason of the actual knowl-

edge of its president, when the latter was dealing with it in his individual capacity, and not acting officially for the bank in any manner concerning the particular transaction.

It has been frequently held that notice to an officer of a bank or other corporation of an equity will not be imputed to the bank or corporation when such officer was clearly not dealing for the bank or corporation, but was dealing for himself with the bank or corporation. This case is stronger because here Thomas E. Cooper made an outside transaction, the sale of stock in another bank to defendants, and had no part in discounting the note they gave which is in suit.

The evidence justified the jury in finding that in this case, where the note was payable to the Bank of Southport and discounted by it, the mere fact that Thos. E. Cooper, who made the fraudulent representations and profited by it, would not be imputed to the Bank of Southport, of which he was only nominally president, when its officers, actually and actively conducting its affairs, had no knowledge of the fraud perpetrated upon the defendants which was in nowise a part of the transaction by which the defendants executed their note to the Bank of Southport and received the net proceeds of the same.

The only other assignment of error in the defendant's brief, to the evidence, does not require discussion.

The Bank of Southport loaned the defendants the $5,000 on their note now in suit, and the jury having found that such bank had no notice of the fraud, and that it purchased the note for value and before maturity, it was not affected by the fraud of Thos. E. Cooper in procuring the defendants to execute said note for his individual benefit, and is entitled to recover the sum loaned.

No error.

THOMAS KILPATRICK v. W. D. KILPATRICK.

(Filed 9 April, 1924.)

1. Limitation of Actions—Statutes—Payment.

C. S., 416, providing that a promise to repel the running of the statute of limitations, unless contained in some writing signed by the party to be charged thereby, etc., expressly excepts from its provisions the effect of any payment of principal or interest, thereby leaving as to such payments the principles obtaining at common law before the enactment of the statute.

2. Same—Instructions—Appeal and Error.

When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year

period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice.

APPEAL by plaintiff from *Grady, J.*, at August Term, 1923, of DUPLIN.

Civil action. The action is to recover a balance due on account. Plea, the statute of limitations. Summons issued 24 December, 1921.

There was evidence on the part of plaintiff tending to show that he had a running account for goods sold and money advanced, etc., against defendant, who was his brother, a large part of which was for items, etc., bearing date in 1897 and 1898, to the amount of $750 and more. There were also some additional items in 1899 and 1905 and 1906, and also in 1917. That in 1919 he approached his brother and solicited a payment of or on the account held by plaintiff, saying, among other things, that plaintiff was indebted to defendant for building a house on plaintiff's land in 1898, and which was to be paid for when a settlement was had between them, ascertaining the amount due. That no such settlement was ever had to that time, and plaintiff suggested a credit of $150 as a proper amount to be allowed for building the house. Defendant said he had forgotten about the house, and to give him credit for what plaintiff thought it was worth. Plaintiff said he ran the amount up to $200 for the house, and asked defendant if that was satisfactory to him, and he replied, "Just whatever you think is right," "and I thereupon gave him a credit on my account for $200. This was on 10 January, 1919." Plaintiff testified further as follows:

"I was at his house when I gave him credit for the $200. I asked if he could not pay me something, and he asked how much he owed me. He said, if I thought $200 was what building the house was worth, to give him credit for what I thought it worth, and I told him I would give him credit for $200. I did not show him the original account. The book with the original account had been left with him. I had added the account up, and when I got the book the account was torn out, and that is the reason I have not got the original account. This is the original book of accounts. Here is where he tore it out. This account was not indexed; don't know why; just put the whole thing in the book. After the account was torn out, I remembered the dollars it amounted to, but not the cents. I didn't get the whole thing. He bought a stock of goods from me in 1897. The oil tank and scales were left with him in the store. Didn't sell them to him; he took them away with him in 1917. I got the book from him before he left, in 1917. It was about 1916 when I wrote down the account I now have. He left in 1917, and the $200 credit was put down in 1919. I did not put down

all the account at one setting; did not put it all down at one time." (Book showing the account sued on, and the credit of $200 for building the house, offered in evidence.)

The case was submitted on the issue whether same was barred by the statute. And, in reference to the effect of the alleged credit of $200 allowed for building the house in 1898, the court, among other things, charged the jury: "The plaintiff contends that the work was done something like ten years ago, and in 1919 he agreed that the credit should be $200. Gentlemen, the time the credit must be applied must be at the time the work was done, and not when the credit was applied. Therefore, I charge you that, if you believe all the evidence in the case, you will answer this issue 'Yes,' that it is barred by the statute of limitations."

Plaintiff excepted. Verdict for defendant. Judgment, and plaintiff appealed, assigning errors.

Oscar B. Turner for plaintiff.
No counsel for defendant.

HOKE, J. Our statute (C. S., 416) provides that no acknowledgment or promise is evidence of a new or continuing contract, from which statute of limitations runs, unless it is contained in some writing, signed by the party to be charged thereby, "but this section does not alter the effect of any payment of principal or interest." And in our decisions construing the section it is held that the same does not restrict or modify in any way the effect of a payment under the general principles prevailing in this jurisdiction when the statute was enacted. *Battle v. Battle,* 116 N. C., 161; *Bank v. Harris,* 96 N. C., 118; *Riggs v. Roberts,* 85 N. C., 152.

Considering the record in view of this position, the question presented is whether the facts in evidence on the part of plaintiff, accepted as true and interpreted in the light most favorable to him, permit the reasonable inference or finding that there was a payment by defendant on plaintiff's account as claimed by him within three years next before action brought (24 December, 1921), and under circumstances constituting a renewal of defendant's indebtedness. In this connection it is well understood that mutual debts do not *per se* extinguish each other, and that in order for one to constitute a payment of another, in whole or in part, there must be an agreement between the creditor and the debtor that the one shall be applied in satisfaction of the other, in whole or *pro tanto,* according to the respective amounts.

Thus, in *Bank v. Harris, supra,* it is held: "The effect of section 172 of The Code is to leave the law as it was prior to the adoption of the

Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. The fact that the maker of a note has a claim against the holder, which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note."

In 30 Cyc., a payment is said to be "a delivery by the debtor or his representative to the creditor, or his representative, of money or something accepted by the creditor as the equivalent thereof, with the intent on the part of the debtor to pay the debt, in whole or in part, and accepted as payment by the creditor." And in support of this definition the author cites, among other cases, *Borland v. Bank,* 99 Cal., p. 89, to the effect "That payment, like a sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment."

And in 21 R. C. L., Title, Payment, sec. 3, it is said: "The authorities agree that to constitute payment, the money or other thing must pass from the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose."

And, as pertinent to the inquiry, the authorities further hold that, in order to constitute a renewal of an account or obligation otherwise barred by the statute of limitations, the alleged payment must be made and received "under circumstances permitting the inference that the debtor did so in recognition of the existence of the debt and of his obligation to pay the same." *Supply Co. v. Dowd,* 146 N. C., 191; *Battle v. Battle, supra; Riggs v. Roberts, supra.*

On a proper application of these authorities, and the principles they approve and illustrate, we must conclude that if any payment was made by defendant on plaintiff's account, it took place not when the house was built by plaintiff, in 1898, but in January, 1919, when, according to plaintiff's version, it was agreed between the parties that defendant's claim for building the house should be credited as a payment on plaintiff's account. And, on the facts in evidence, plaintiff is entitled to have the issue submitted to the jury on the question whether it was agreed between the parties in 1919 that defendant's claim for building the house should be then received as a payment on the entire account of plaintiff or on any part of same, and if so, what part.

There should be a new trial of the issue, and it is so ordered.

New trial.

STATE v. J. S. LOWE.

(Filed 9 April, 1924.)

Criminal Law—Immigrant Agents—License—Statutes.

An isolated instance of employment of labor in this State for work in progress in another State, by either an individual or corporation, or by the employees of a corporation in charge thereof, does not fall within the intent and meaning of Schedule B, sec. 79, ch. 4, of the Public Laws of 1923, being an act to raise revenue, and the fine or punishment therein imposed for the failure to take out the license prescribed does not apply.

APPEAL by defendant from *Lane, J.*, at December Term, 1923, of FORSYTH.

Criminal action, heard on appeal from municipal court.

The jury embodied the pertinent facts in a special verdict, and on such facts, the court, being of opinion that defendant was not guilty, said defendant was acquitted and discharged, and the State appealed. The said special verdict and proceedings thereon are set forth in the record, as follows:

"That the Norfolk and Western Railway Company is a corporation, duly organized and incorporated under the laws of the State of Virginia, and is engaged in the business of common carrier of freight and passengers for hire, and in order to conduct such business, is the owner of, and operates, lines of railroads in the States of Virginia, West Virginia and other States, including North Carolina, and among the lines operated in North Carolina is a line of railroad from the city of Roanoke, Va., to the city of Winston-Salem, N. C.; that on 1 September, 1923, and subsequent thereto, the said Norfolk and Western Railway Company was electrifying its steam railroad from Welsh, W. Va., to Yeager, W. Va., upon which line is and was located the station of Davy, W. Va.

"That the defendant, J. S. Lowe, was at that time, is now, and has been for many years an employee of the said Norfolk and Western Railway Company, holding the position of gang leader, or foreman, in the engineering department, which is in charge of this construction work; that on or about 1 September, 1923, the defendant, J. S. Lowe, was directed by one of the superintendents of the said Norfolk and Western Railway Company, who was in charge of this electrification work, to come to Winston-Salem, N. C., and employ about twenty-five laborers to work for said railway company, and did furnish to this defendant transportation for himself and twenty-five laborers from Winston-Salem to Davy, W. Va., at which point the laborers to be hired were to be engaged in the work of electrifying said line of the Norfolk and Western

Railway Company; that the defendant, pursuant to this direction given him, as aforesaid, came to Winston-Salem on or about 5 September, 1923, and did employ in the city of Winston-Salem eighteen laborers, and made a contract with said laborers in the city of Winston-Salem to work for the Norfolk and Western Railway Company, at Davy, W. Va., at the price of 40 cents per hour; that on or about 5 September, 1923, the defendant did take and carry away from the city of Winston-Salem, N. C., upon the transportation furnished as aforesaid, eighteen laborers, under the contract as aforesaid, to Davy, W. Va., which laborers then and there worked for the Norfolk and Western Railway Company, and for none other; that the defendant was not, and is not now, an officer or director of the Norfolk and Western Railway Company, and has never been sent out by said railroad company to employ laborers at any time prior or subsequent to this time.

"That at the time mentioned herein, and at the times subsequent thereto, and since then, neither the Norfolk and Western Railway Company nor this defendant had paid the license, as required by the statute entitled 'An act to raise revenue,' Schedule B, sec. 79, Public Laws 1923.

"If upon the foregoing facts the court be of the opinion that the defendant is guilty, the jury so find; otherwise, they find him not guilty.

"Not guilty.

"The court being of the opinion that the defendant is not guilty, the jury so finds not guilty for their verdict.

HENRY P. LANE, *Judge Presiding.*"

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Swink, Clement & Hutchins and F. L. Webster for defendant.

HOKE, J. Under our decisions construing this or statutes of similar import, it is held that the license tax imposed by the law is for engaging in the business of procuring labor for employment in another State, and does not apply or extend to a case where one corporation or individual is in a special instance procuring hands for his own work. *Lane v. Comrs.,* 139 N. C., 443; *S. v. Sheppard,* 138 N. C., 579; *Carr v. Comrs.,* 136 N. C., 125.

In *Carr v. Comrs.* it was held that Laws 1903, ch. 247, sec. 74, imposing a license tax on emigrant agents, does not apply to a person who comes into this State and employs hands to work for him in another State.

And in *Lane's case,* where an officer of a corporation had come into this State and, without paying the license tax, had hired hands to be

employed in present work for his company in another State, *Associate Justice Connor,* delivering the opinion, said: "This case, in our opinion, comes within the principle of *Carr v. Comrs.,* 136 N. C., 125, the only difference between the two cases being that in one the plaintiff hired hands for himself, while in the other he hired them for a corporation, of which he was a director and manager in respect to the work for which the hands were employed."

The facts as set forth in the special verdict, showing that this was a single instance where defendant, by direction of the company's superintendent, employed a lot of hands for his company for presently doing the work of which he had special charge, the case, in our opinion, comes directly within the principle of the above-cited cases, and the verdict and judgment acquitting defendant is affirmed.

No error.

STARKWEATHER & SHEPLEY v. J. O. W. GRAVELY.

(Filed 9 April, 1924.)

Principal and Agent—Broker—Insurance—Ratification.

Where the broker, unauthorized by the owner, has paid an extra war rate of insurance for water foreign transportation of a shipment of tobacco, any act or conduct of the owner after the safe transportation of the shipment will not be construed as a ratification of the agent's unauthorized act, so as to allow the broker a right of action to recover of the owner the extra rate the former has so paid.

APPEAL by plaintiff from *Connor, J.,* at September Term, 1923, of NASH.

Civil action, to recover the balance alleged to be due by reason of certain insurance premiums being paid by plaintiff for benefit of the defendant and at his request.

From a verdict and judgment in favor of defendant, plaintiff appeals, assigning errors.

Battle & Winslow for plaintiff.

Finch & Vaughn, L. V. Bassett, and Manning & Manning for defendant.

STACY, J. Plaintiff, a brokerage firm, specializing in marine insurance, was employed by the defendant, in August, 1918, to effect several policies of fire and marine insurance on a quantity of leaf tobacco to be

shipped from points of origin in North Carolina by rail to Tacoma, Washington, and thence by water to Shanghai, China. Defendant contends that he has paid for all the insurance authorized by him, while plaintiff contends that, on account of peculiar conditions, due to the war, additional or higher-rate insurance was necessary to protect the tobacco from loss or damage while in transit, and that this was authorized by the defendant. Plaintiff, as defendant's broker, having paid for this additional or higher-rate insurance, brings suit to collect the amount so paid for the benefit of the defendant.

Without stating the facts in detail, which are somewhat complicated and make a rather long story, the single question of law presented by the appeal arises upon plaintiff's exception to the following portion of the charge:

"I instruct you, gentlemen of the jury, that no conduct on the part of Mr. Gravely with respect to this insurance subsequent to the arrival of the tobacco at its destination, after the hazard against which the contracts of insurance had become effective had ceased to exist, could be a ratification of the contract of insurance."

Immediately following this instruction, his Honor continued: "Any conduct of his subsequent to that time, however, would be evidence upon the contention of the plaintiff that Mr. Gravely had either authorized the making of the contracts or ratified the making of them by his agent, the plaintiff."

It will be observed that the insurance company is not a party to this suit; hence it is unnecessary for us to say in the present action whether or not, as against the insurance company, a property owner may, after loss and before the insurer has withdrawn from the contract, ratify the unauthorized act of his agent in securing insurance upon his property. The authorities are not in harmony on this point. *Nelson v. Ins. Co.,* 120 N. C., 302; *Kline Bros. & Co. v. Royal Ins. Co.,* 192 Fed., 378; *Marqusee v. Hartford Fire Ins. Co.,* 198 Fed., 475; 42 L. R. A. (N. S.), 1025, and note, where the matter is fully discussed.

As between the agent and his principal, or the broker and his customer, the question presented here, the decisions are uniform and to the effect that where the principal, with full knowledge of the facts, accepts the benefits of a contract made in his behalf, he must also bear its burdens. The substance of ratification is confirmation after conduct. 2 C. J., 467; *Bank v. Justice,* 157 N. C., p. 375; *Osborne v. Durham,* 157 N. C., 262; *Sprunt v. May,* 156 N. C., 388; *Johnson v. R. R.,* 116 N. C., 926; *Rudasill v. Falls,* 92 N. C., p. 226; *Miller v. Lumber Co.,* 66 N. C., 503; *Patton v. Brittain,* 32 N. C., 8.

As we understand the record, the case was tried upon the theory that, although the defendant may not be able to recover for his loss from the

insurance company, yet he would still be liable to the plaintiff if he, at any time, undertook to ratify what the agent had done in his behalf. This would seem to afford the plaintiff no cause for complaint. The jury found the facts as follows:

"1. Did the defendant authorize the plaintiff to effect insurance on the tobacco in question on other ships, when it was found that it could not go forward on the Mexico Maru, and agree to pay extra premiums necessary, as alleged by plaintiff? A. No.

"2. If not, did defendant ratify plaintiff's actions in so doing? A. No."

The record presents no reversible error.

No error.

SAM J. STEVENS v. SOUTHERN RAILWAY COMPANY.

(Filed 9 April, 1924.)

1. Contracts—Employment for Life—Consideration—Railroads.

A contract for the continued employment of a railroad company for his life, in consideration of the employee's forbearance to sue the company for damages he has received, caused by the company's negligence, is not invalid for indefiniteness of the duration of the employment, and is supported by a sufficient consideration.

2. Same—Evidence.

Where a railroad company is sued by its employee for breach of a valid contract of employment for life, in consideration of forbearance of its employee to sue for damages for a personal injury negligently inflicted by it while in its employment, evidence of the extent of such injury is competent upon the question of the sufficiency of the consideration to support the contract.

3. Railroads—Consideration—Contracts—Employment — Personal Relations.

Where a valid contract for the employment of personal services for life has been made by a railroad company in consideration of forbearance by the employee to sue the company to recover damages for a personal injury, it is binding upon a subsequent combination of this and other railroads that continued to accept the employee's services in recognition of the contract, and the principle upon which a contract of this character may not be assigned is inapplicable.

4. Appeal and Error—Objections and Exceptions—Instructions—Presumptions.

On appeal, it will be presumed that the charge to the jury of the trial judge submitted all material and substantive phases of the evidence, when no exception has been taken thereto.

APPEAL by defendant from *Connor, J.*, at January Term, 1924, of DURHAM.

The jury returned the following verdict:

1. Did the defendant enter into contract with the plaintiff that it would keep him in its employment so long as plaintiff should live, as alleged in the complaint? Answer: Yes.

2. If so, did defendant wrongfully breach said contract, as alleged in the complaint? Answer: Yes.

3. What sum, if any, is plaintiff entitled to recover of defendant as damages? Answer: $1,000.

The plaintiff testified that he had worked for the Richmond and Danville Railroad and the defendant, its successor, from 1879 until his discharge, which took place in July or August, 1921; that he had been injured through the negligence of the road for which he was working in 1883; that he had suffered later injuries, which were due to the same cause, and had afterwards entered into a written contract executed by himself, Captain West, Captain Green, superintendent of the road, who was afterwards general manager of the Southern Railway, and another man whose name he did not remember; that all these men were dead but had worked for the defendants; that the contract, which had been burned, provided substantially that if he did not sue the railroad for his injuries it would give him a job as long as he could work and take care of him afterwards. He further testified that in 1916 the president of the defendant company gave him a bronze badge on one side of which was the inscription, "Southern Railway Company for Loyalty," and on the other, "Sam J. Stevens, 1879 to 1916"; that he was 71 years old and at the time of his discharge was earning about $60 a month.

The defendant denied the execution of the alleged contract and introduced evidence tending to show that the Southern Railway was not organized until 1894 and that the plaintiff had been discharged for neglect of duty. The defendant also alleged that the cause of action was barred by the statute of limitations, but tendered no issue as to this question, and none was submitted.

Brawley & Gantt and R. O. Everett for plaintiff.
Fuller & Fuller for defendant.

ADAMS, J. The first six exceptions are addressed to the admission of evidence tending to show the nature and extent of the plaintiff's injuries. These injuries are described in the complaint, not for the purpose of stating a cause of action, but of showing both the reasonableness of the contract relied on and the circumstances under which it was made. The plaintiff alleges that he filed no claim for damages because

he was assured by the company, through whose negligence he had been injured, that in consideration of his waiver he should have employment as long as he lived, and the evidence excepted to was properly admitted as tending to show the consideration upon which the agreement was made, and it was no doubt so understood by the jury.

It has been held that contracts of this character are not against public policy or incapable of enforcement on the ground of indefiniteness merely because the exact period of service is not specified. Hence the courts have sustained contracts by employers to give to servants injured by their negligence "steady and permanent" employment, or employment "as long as the company's works are running," or "so long as the business of a corporation continues," or during the life of the employee, or to give "a living wage required for the support of the employee and his family." As we have indicated, it cannot be said that the contract between the plaintiff and the railroad was without consideration. They entered into a compromise and adjustment of the plaintiff's claim for damages, and "such adjustment will afford a sufficient consideration for the agreement whether the agreement was well founded or not." *Fisher v. Lumber Co.,* 183 N. C., 485; *Pennsylvania Co. v. Dolan,* 6 Ind. App., 109; *Lead Co. v. Kinlin,* 47 Neb., 409; *McMullen v. Dickinson Co.,* 63 Minn., 405; *Carnig v. Carr,* 35 L. R. A. (Mass.), 512; *Texas C. R. Co. v. Eldridge,* 155 S. W. (Texas), 1010; *Cox. v. Railroad,* 50 L. R. A. (N. S.) (Ind.), 453 and note. See, also, *Rhyne v. Rhyne,* 151 N. C., 400; *Re Estate of McVicker,* 28 L. R. A. (N. S.), 1112.

These propositions, as we understand, are not seriously disputed, but it is insisted that the contract was made, if at all, with the Richmond and Danville Railroad, and is therefore not binding on the defendant. We are not inadvertent to authorities holding that executory contracts for personal services involving a personal relation or confidence between the parties cannot be assigned (*R. R. v. R. R.,* 147 N. C., 368), but in our opinion the disposition of the present appeal is not dependent upon a decision of this question. There was evidence tending to show that the contract had been duly executed on the part of the Richmond and Danville Railroad Company by three men, including Captain Green, the superintendent, who was afterwards superintendent of the defendant; that the defendant was formed by the combination of the Richmond and Danville Railroad and other roads, and that when the consolidation was concluded the Richmond and Danville Railroad was "one of the constituent elements of the Southern"; that after the combination some of the former officers continued in the service of the defendant, and that the plaintiff had been awarded a bronze medal bearing the two inscriptions, "Sam Stevens, 1879 to 1916" and "Southern Railway Company for Loyalty." These and other circumstances appearing from

the evidence were sufficient to create a reasonable inference that the defendant, with knowledge of the contract, continued the plaintiff's employment and recognized and ratified the agreement under which the compromise was effected and the service rendered and accepted. There was no exception to the charge, and we must presume that all material and substantive phases of the evidence were properly submitted to the jury. *Todd v. Mackie,* 160 N. C., 352; *Brown v. Brown,* 182 N. C., 42; *S. v. Jones,* 182 N. C., 781.

After a careful examination of the record we find no reversible error. No error.

JOHN W. HILL v. JERRY PATILLO.

(Filed 9 April, 1924.)

Pleadings—Judgment by Default—Intervener—Issues—Title—Right of Possession.

A landlord, intervening in an action of the mortgagee of a crop raised by the tenant on the intervener's land and covered by the plaintiff's mortgage, is permitted only to raise the issue as to his superior lien over that of the mortgagee, and not required to be otherwise plead in the action; and when the intervener's motion is sufficient in this respect, C. S., 840, it is reversible error for the trial judge to render a judgment by default for the want of intervener's answer, the procedure, if desired, being to require the intervener to make his motion more specific, or file an answer to that effect.

APPEAL by A. W. Clark, intervener, from *Devin, J.,* at October Term, 1923, of ORANGE.

Civil action. The action is to enforce collection of a debt claimed by plaintiff against defendant, and secured by chattel mortgage in part on defendant's crop of corn and tobacco for the year 1920, the defendant being a tenant of A. W. Clark, intervener.

The summons was issued, and at the same time ancillary process of claim and delivery, on 22 November, 1922, and the crop in question seized and delivered to plaintiff. On 25 November A. W. Clark filed an affidavit in the cause as follows:

"A. W. Clark, being duly sworn, says that the above entitled action is brought by plaintiff to obtain possession of one automobile and the crop of corn and tobacco raised by the defendant during the year 1920 on lands of affiant, and that he, as landlord, is entitled to the possession of the crop of corn and tobacco in question until his claims for rent and advances to the said Jerry Patillo are satisfied, and he prays the court to be allowed to intervene and to set up his right to said crop of corn and tobacco. A. W. CLARK."

Thereupon an order was entered allowing A. W. Clark to become party and set up any claims or defenses he may have on giving bond in the sum of $500, conditional to abide by and comply with the decision of the court that the crops be delivered to him. Under this order the crops were turned over to A. W. Clark and are now held by him.

Thereafter, on 3 December, 1920, plaintiff duly filed a verified complaint alleging an indebtedness of $600, and that same was secured by a chattel mortgage on defendant's crop for 1920, and that said sum was still due.

No answer having been filed by either Patillo or Clark, judgment by default was entered, which was later set aside as irregular. And at October term, as stated, judgment for want of answer was again entered against the intervener and the surety on his bond. Intervener Clark excepted, insisting on his right to a trial of the issue raised by his affidavit of ownership, and this being disallowed, he appealed.

A. H. Graham for plaintiff.
Gattis & Gattis for interpleader.

HOKE, J. In C. S., 840, it is provided that in proceedings of this character a third person may interplead upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and on filing a bond in double the value of the property for its proper delivery and the payment of any and all costs and damages that may be awarded against him, and on matters more directly relevant to the questions presented the section provides further that "A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right of property specified in plaintiff's complaint."

In such a proceeding the intervener is not called on or required, and indeed he is not permitted to question the validity of plaintiff's claim against defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener has himself become the actor in the suit and on authority is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. *Mitchell v. Tally,* 182 N. C., 683; *Maynard v. Ins. Co.,* 132 N. C., 711; *Cotton Mills v. Weil,* 129 N. C., 452.

As said by the present *Chief Justice* in *Maynard's case,* "An interpleader is entitled to but one issue, 'Does the fund belong to him?'" In *Weil's case* it is held, among other things, "An intervener has no

right to interfere in the action between the original parties, he being interested only in the title to the property."

This being the position approved by the decided cases, while it is always better for an intervener to set forth his claim with sufficient definiteness to apprise the original parties of its nature and extent, if the affidavit is sufficient for this purpose there is no reason why the issue raised therein may not be inquired of and determined by the jury, and the statute above referred to seems to provide that if the affidavit is sufficient to present the issue, this is all that is essential. Doubtless, as in other claims of this kind which a court is called on to investigate or determine, if a more extended statement is desirable, looking to a fuller settlement of all matters embraced within the issue, the court may order such statement to be made and require that a formal complaint be filed, but with an affidavit on file in the cause of the kind presented in this record, an issue of title is clearly raised, and it is in any event erroneous to enter judgment for plaintiff because the intervener has not filed an answer denying plaintiff's claim.

As said in some of the decisions cited, the intervener is not interested in such demand or the extent of it, and his affidavit being sufficient to raise an issue as to his own claim, it should have been submitted to and determined by the jury.

This will be certified that the issue raised by the affidavit be determined without prejudice to the right of the trial court to order a fuller statement as to the extent and amount of intervener's claim as landlord of the defendant.

Error.

STATE v. JIM ELKINS.

(Filed 9 April, 1924.)

1. Taxation—Trades—Classification—Legislative Discretion—Statutes.

The Legislature has power to tax trades, etc., and the right of classification is referred largely to the legislative discretion, with the limit that its exercise must not be palpably arbitrary.

2. Same—Garage—Automobile Repairing.

Chapter 4, Schedule B, sec. 77, of the Revenue Act of 1923, imposing a license tax on the business of maintaining a garage, defining it to be "any place where they are repaired or stored," includes within its terms one who personally, and without employed assistance, only repairs automobiles for a living on a place on the premises with his own dwelling, and the statute is a valid exercise of the legislative discretion.

APPEAL by defendant from *Calvert, J.*, at January Term, 1924, of NEW HANOVER.

STATE *v.* ELKINS.

Indictment for violation of section 77, chapter 4, Laws of 1923, imposing license tax on certain trades and professions. The jury rendered a special verdict, finding the facts to be as follows:

"1. That the defendant had a shop back of his home on his own land where he had tools and appliances with which he repaired automobiles for any one who desired the same to be repaired, that he made charges for his services and that he collected for the same.

"2. That the defendant did not charge storage on the cars, but only charged for the repairs that were made, and received compensation for said services.

"3. That the defendant had no other business except repairing automobiles and that he did it for his livelihood.

"4. That the defendant employed no helper, did his own work, and employed no one to assist him.

"5. That the defendant resides and does business in a city having a population of more than 20,000 inhabitants, and was doing this work subsequent to 1 June, A. D. 1923, and has continued since then, and has declined to pay the tax charged under section 77 of the Revenue Law of 1923 for the reason that he believed that it was a tax on his own labor and was in violation of the Constitution.

"Upon the foregoing facts the jury finds that if it was a violation of the law for the defendant to do what he did without paying the license tax then the jury finds him guilty; if it is not a violation of the law then the jury finds him not guilty."

Upon these facts, the court being of opinion that the defendant was guilty as charged, there was verdict of guilty, and the court imposed a fine of $10. Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Herbert McClammy for the defendant.

HOKE, J. The tax in question is under Schedule B of the Revenue Act of 1923, ch. 4, imposing license taxes on certain trades and professions; section 77 being on the business of maintaining or operating a garage, and in which a garage is defined as "any place where automobiles are repaired or stored, for which a charge is made."

On the facts established by the special verdict, the defendant's case clearly comes within the statutory provision, and we know of no reason that would justify us in holding the law to be invalid. The power of the Legislature to impose taxes of this general character is undoubted, and the right of classification is referred largely to the Legislature's discretion, with the limit that it must not be palpably arbitrary. *Tullis*

v. R. R., 175 U. S., 348; *Ins. Co. v. Dagg*, 172 U. S., 562; *McGowan v. Savings Bank*, 170 U. S., 286, cited in *Efland v. R. R.*, 146 N. C., 139.

In *S. v. Worth*, 116 N. C., 1007, it is held among other things that the word "trade, when used in defining the power to tax, includes any employment or business for gain or profit." And in the fully considered case of *Smith v. Wilkins*, 164 N. C., 135-148, *Associate Justice Allen* states as the proper deduction from the authorities on the subject:

"(1) That the plaintiff is engaged in a trade within the meaning of the Constitution.

"(2) That the General Assembly has the power to tax trades.

"(3) That in the exercise of this power the General Assembly is not required to tax all trades, but may tax some and refuse to tax others.

"(4) That the General Assembly has the power to make classifications subject to the limitation that the tax must be equal on those in the same class, and that there must be some reason for the difference between the classes.

"(5) That it has the power to provide regulations determining the different classes, and that these will not be interfered with unless utterly unreasonable.

"(6) That if the General Assembly has exceeded its power, it is the duty of the courts to so declare, but that every presumption is in favor of the proper exercise of the power of the General Assembly, and the courts will not declare otherwise except in extreme cases and from necessity."

The repairing of automobiles is not infrequently of such an extent and character that unless the definition, as in this instance, is made to include both repairing and storing of vehicles, it would be at times well nigh impossible to bring any such business within the effect of a license tax, and on reason and authority, we are of opinion that on the facts presented the defendant has been properly convicted.

No error.

LESSIE I. WALKER v. A. T. BUTNER.

(Filed 9 April, 1924.)

Estates—Contingent Remainders—Rule in Shelley's Case—Wills—Devises—Title.

A devise of an estate for life, "and to her heirs if at her death she should leave any, and if not," with limitation over: *Held*, the first taker acquired thereunder a fee-simple title, defeasible in the event she left no heirs, under the rule in *Shelley's case;* and where the ulterior remainderman has conveyed his title to the first taker, any defect as to her having acquired an absolute fee-simple title is cured.

APPEAL by plaintiff from *Bryson, J.,* at February Term, 1924, of FORSYTH.

Swink, Clement & Hutchins for plaintiff.
No counsel for defendant.

CLARK, C. J. This is an action to enforce a contract by the defendant to pay the plaintiff $2,500 for the land described in the pleadings, provided the plaintiff could convey to the defendant a deed in fee simple with full covenants of warranty, which he subsequently refused to do.

The case turns upon the construction of the will of Martha E. Sides, a widow at the date of her death, without children, who had adopted Lessie I. Walker. The defendant in this case is a kinsman of the plaintiff and also of the testatrix and is willing to pay the purchase-money if Lessie I. Walker can make him a deed in fee simple to said property. The third paragraph of the will is as follows: "I give and bequeath to Lessie I. Walker, whom I adopted as my own child, my house and lot, also lot of land known as the shop lot in Bethania below the house, to be hers her lifetime, and if at the time of her death she should leave any heirs, it is to be theirs; if not any heirs, it is to go to my brother, Charlie A. Butner, whom I appoint as my lawful executor." Charlie A. Butner is a kinsman of the plaintiff and defendant, and prior to the institution of this action executed a deed conveying all of his right, title and interest in the land described in said paragraph to the plaintiff.

The sole question that arises is what interest Lessie I. Walker took under this will. The following is the concise definition of the rule in *Shelley's case,* 1 Coke, 104: "When the ancestor by any gift or conveyance taketh an estate of freehold and in the same gift or conveyance the estate is limited either mediately or immediately to his heirs, in fee or in tail, the word *heirs* is a word of limitation of the estate, and not a word of purchase."

These words have been construed in the leading cases of *Morrisett v. Stevens,* 136 N. C., 160, and *Sessoms v. Sessoms,* 144 N. C., 121, and others in which the language is almost identical with that in this will. Under them and many other cases which have followed substantially the words used in this will, these words give the property to Lessie Walker for life, remainder to her heirs if she should leave any, and if not, the land was to go over to testator's brother, Charlie A. Butner.

It therefore follows upon the plain language of the will that the plaintiff, Lessie Walker, took a fee simple in the land, defeasible, however, if she die leaving no heirs, in which case it would go to Charlie A. Butner.

Any deed therefore which she should make to the plaintiff would be a valid fee simple, subject to be divested if she should die leaving no

heirs. *Whitfield v. Garris,* 131 N. C., 148, which was reaffirmed on a rehearing, 134 N. C., 24, and which has been often cited since as the undisputed law of this subject in this State.

But that possible defect is cured by the fact that in such event the property would go over to Charlie A. Butner, who has already conveyed by deed to Lessie I. Walker all right, title and interest which he might have in the property in the event of her death without heirs.

In *Puckett v. Morgan,* 158 N. C., 344, upon language different from that herein, it was held that the rule in *Shelley's case* did not apply. Upon the language of this devise there can be no controversy, upon the settled cases, that in this instance the devise to Lessie Walker and her heirs is a fee simple under the rule in *Shelley's case* which would be defeasible, for should she die without heirs it would go to Charlie A. Butner. As he has already conveyed his interest to the plaintiff in this case, in any event the deed of the plaintiff which has been tendered to the defendant would make a good fee simple, indefeasible title.

In *Nichols v. Gladden,* 117 N. C., 497, it is well said that "the rule in *Shelley's case* is a rule of law and not of construction, and no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs, or 'heirs of his body,' and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies, and the whole estate vests in the first taker." That is well-settled law, and has been repeated and approved in *Smith v. Moore,* 178 N. C., 374, citing 6 Cruise, 325, 326, 328; Fearne on Remainders, 196; Hargraves Tracts, 551; 4 Kent, 208, 214, and divers cases.

The history of the origin and the reason of the rule are stated in the concurring opinion in *Cohoon v. Upton,* 174 N. C., 91, and it is there pointed out that the original object of the rule was to "secure the feudal owners of lands against the loss of wardships and other 'rake-offs' upon which the feudal lords lived at a time when land was the principal wealth and the foundation of dignity and influence, and was a highly technical one, contradicting the plain intent of the grantor or devisor, . . . but at present it serves an excellent but an entirely different purpose in this State, in that it prevents the tying up of real estate by making possible its transfer one generation earlier and also subjecting it to the payment of the debts of the first taker. It is doubtless for this reason that the rule has never been repealed in North Carolina."

The nonsuit granted by the court below and the decree that the plaintiff held only a life estate in the land is

Reversed.

HOSEA BARBEE, EXECUTOR GREEN BARBEE, v. BERLINA BARBEE.

(Filed 9 April, 1924.)

1. Husband and Wife—Widow's Reasonable Support—Statutes—Actions—Issues—Validity of Marriage.

The effect of C. S., 1667 (amended by chapter 123, Public Laws of 1921), has been changed by statute, chapter 24, Public Laws of 1919, and thereunder it is not now required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees, pending the trial and final determination of the issue relating to the validity of the marriage.

2. Same—Death of Husband.

The right of the wife, in proper instances, for her reasonable support and counsel fees, continues only during the lifetime of the husband or the separation of the wife from him, the widow, after his death, having in lieu thereof, acquired a widow's right and interest in his property.

APPEAL by plaintiff from *Devin, J.*, at September Term, 1923, of DURHAM.

Civil action instituted by Green Barbee to have the record of marriage licenses in the office of the register of deeds for Durham County purged of a marriage license purporting to have been issued to Green Barbee and Berlina Barbee, and the return thereon tending to show the celebration of a wedding under and by virtue of said license, it being alleged that the same was spurious, a fraud upon his rights, and constituted a cloud upon the title of his real estate.

The defendant set up a cross-action or counterclaim, alleging that the said record was valid and regular in all respects; and defendant asked for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issues involved in said action, under authority of C. S., 1667, as amended by chapter 123, Public Laws 1921.

From an order granting the defendant an allowance for a reasonable subsistence and counsel fees, the plaintiff appeals.

Brogden, Reade & Bryant for plaintiff.
R. O. Everett and Brawley & Gantt for defendant.

STACY, J. Plaintiff takes the position that where the fact of marriage is in issue, as it is here, no order awarding an allowance for a reasonable subsistence and counsel fees under C. S., 1667, as amended by chapter 123, Public Laws 1921, may be made until such issue has been determined by a jury. Such was the holding in *Crews v. Crews,*

175 N. C., 169, decided 6 March, 1918, but the law in this respect has been changed by chapter 24, Public Laws 1919; and it is now provided by statute that the wife may make application for an allowance for a reasonable subsistence and counsel fees "pending the trial and final determination of the issues involved in such action." His Honor finds as a fact for the purposes of his order, but without prejudice to the rights of either party on the hearing, that the marriage relation existed at the time of the commencement of the action and at the hearing of the motion for an allowance. This finding is supported by ample evidence.

The order, which forms the basis of plaintiff's appeal, is subject to no legal error. For an interesting discussion of the subject, see *Hite v. Hite,* 45 L. R. A., 793.

It appears that after the signing of the order in question and pending the appeal to this Court, Green Barbee died and his executor has come in and made himself a party to this proceeding.

Of course defendant's allowance for a reasonable subsistence ceased with Green Barbee's death, as she then acquired a widow's interest and rights in his property, if such she really be, which is denied by the executor. *Gaines v. Gaines,* 9 B. Mon. (Ky.), 299; 48 Am. Dec., 425; 2 A. & E. Enc., 139. "The right to alimony continues only during the lifetime of the husband, or during the separation of the wife from him." *Lockridge v. Lockridge,* 28 Am. Dec., 52. There is no provision in our statute which authorizes a continuance of the allowance for a reasonable subsistence after the death of the husband. *Knapp v. Knapp,* 134 Mass., 353.

Affirmed.

LAURA BAKER SNOWDEN v. BARNARD E. B. SNOWDEN ET ALS.

(Filed 9 April, 1924.)

Estates—Wills—Devise—Tenancy in Common—Remainders.

A "bequest" of lands to a daughter of the testatrix, her "children, her heirs and assigns": *Held,* the use of the words "her heirs" after the word "children" does not by construction eliminate the effect of the use of the word "children," or give the life tenant a fee-simple title, but she and her children living at the time of the death of the testatrix take the lands as tenants in common.

APPEAL by plaintiff from *Finley, J.,* at January Term, 1924, of HENDERSON.

This is an action to remove a cloud upon title and for that purpose to construe the following section of the will, which is the only portion

thereof relating to the land in question: "I bequeath and give to my daughter Laura, children, her heirs and assigns, all my lots of land with the buildings thereon in the town of Hendersonville, N. C." The court below held that plaintiff and defendants, the three children of the plaintiff, were tenants in common of the land in question, and the plaintiff appealed.

G. H. Valentine for plaintiff.
O. V. F. Blythe for defendants.

CLARK, C. J. In the recent case of *Cullens v. Cullens,* 161 N. C., 344, it was held that under a deed of lands made to a woman and her children, she and her children living at the date of the deed take as tenants in common. In that case *Brown, J.,* says: "We think it well settled that where land is conveyed, as in this case, to a woman and her children, they take as tenants in common, and only those born at the date of the deed take unless there is one *in ventre sa mere,* and then such child would also take," citing *Dupree v. Dupree,* 45 N. C., 164; *Gay v. Baker,* 58 N. C., 344; *Heath v. Heath,* 114 N. C., 547; *Campbell v. Everhart,* 139 N. C., 511. This case has been cited and approved in the still more recent case of *Cole v. Thornton,* 180 N. C., 91, which was the construction of a will, and it is said: "The principle that an estate to A. and her children, when there are children, 'vests the present interest in them as tenants in common' is affirmed in *Condor v. Secrest,* 149 N. C., 205, and in *Cullens v. Cullens,* 161 N. C., 344."

In *Benbury v. Butts,* 184 N. C., 24, where the devise was to Dora Benbury and her children and her children's children, it was held: "We think it is clear that under the foregoing devises the title to the lot in question vested in Dora Benbury and her two children living at the time, as tenants in common," citing the three last cases above quoted.

The word "children" is not the equivalent of heirs, and where the conveyance or devise is to a parent and children it has always been construed with us that they take as tenants in common.

In *Ziegler v. Love,* 185 N. C., 42, it is said: "In a devise of land to A. and his children, or issue, if there is a child or issue when the devise takes effect the devisees take an estate as tenants in common. *Moore v. Leach,* 50 N. C., 88; *Gay v. Baker,* 58 N. C., 344; *Hunt v. Satterwhite,* 85 N. C., 74; *Silliman v. Whitaker,* 119 N. C., 92; *Whitehead v. Weaver,* 153 N. C., 88; *Condor v. Secrest,* 149 N. C., 205; *Cullens v. Cullens,* 161 N. C., 344; *Cole v. Thornton,* 180 N. C., 90."

It is true in this case the devise is to "my daughter Laura, children, her heirs and assigns," and the plaintiff contends that the use of the words "her heirs" after the word "children" gave her a fee simple. But

we cannot draw that inference from the word "her" since at the death of the testatrix there might have been no children, and the use of it does not obliterate the word "children" from the devise. The children living at the death of the testatrix as tenants in common with their mother, take under the above well-settled rule of law.

The ruling of the court below is

Affirmed.

C. H. TURNER v. CITY OF NEW BERN ET ALS.

(Filed 9 April, 1924.)

1. Municipal Corporations—Cities and Towns—Police Regulations—Ordinances—Lumber Yards—Courts.

Under the provisions of C. S., 2787, and under the provisions of its charter authorizing a city to pass needful ordinances for its government not inconsistent with law to secure the health, quiet and safety within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere.

2. Same—Equity—Injunction.

Under the facts of this case *it is held* that the defendant's remedy in equity by injunction will not lie, there being an adequate remedy at law.

HOKE, J., concurring; STACY and ADAMS, JJ., concurring in the concurring opinion of HOKE, J.

APPEAL by defendants from *Daniels, J.*, at February Term, 1924, of CRAVEN.

The city of New Bern, by its board of aldermen, upon a petition signed by about 150 citizens, passed the following ordinance:

"Section 1. Whoever establishes, maintains, operates or conducts a lumber yard or wharf where lumber is piled, stacked, or stored within the territory bounded by Johnson, East Front and Pollock streets and the channel of Neuse River shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined the sum of $10, and each day such business is maintained or conducted, or lumber is piled, stacked or stored in violation hereof shall constitute a separate and distinct offense: *Provided,* this ordinance shall not go into effect until 3 February, 1924."

The postponement in the operation of the ordinance until 3 February, 1924, was made at the instance of the counsel of the plaintiff, who was present and opposed its adoption.

That portion of the territory of the city of New Bern within which lumber yards and loading wharves or docks are prohibited by the provisions of this ordinance lies along the portion of Neuse River which has been used almost exclusively for residence purposes during the entire existence of the city since its foundation by de Graffenreid. William Attmore says in his diary in 1787, when he was at Neuse River on his first visit, that "almost all the docks, wharves and shipping were on the Trent River side of the town." Pictures of this water front made in 1865, when the town was occupied by Federal troops, show no wharf or dock in use for any purpose on the Neuse River front from the Justice wharf down to the south side of Broad Street, exactly as it is today.

It is in evidence that this part of the city facing Neuse River, although the city has a water frontage for several miles, has been absolutely open to view for above 100 years, and is the only part of the river fronts of either Neuse or Trent rivers so open. Along this part of the front many of the most prominent and well-known citizens of New Bern have resided, doubtless being largely influenced in the location of their homes by this fact. This section of the shore is not only a place of recreation to the people, but visitors enjoy the view and speak of it with admiration.

This is an action to restrain the enforcement of the above ordinance of the city. From the judgment of the court holding the ordinance invalid and continuing the restraining order, the defendants, the city of New Bern and Edward Clark, the mayor, appealed.

Whitehurst & Barden for plaintiff.
E. M. Green and R. A. Nunn for defendant.

CLARK, C. J. The charter of New Bern, chapter 82, section 27, Private Laws 1899, provides: "Section 27. That the board of aldermen shall have power to make, and provide for the execution thereof, of such ordinances for the government of the city as it may deem necessary, not inconsistent with the laws of the land. It shall have power, by all needful ordinances, to secure order, health, quiet and safety within the same and for one mile beyond the city limits. It may require the abatement of all nuisances within the city at the expense of the person causing the same, or of the owner or tenant of the ground whereon the same shall be."

C. S., 2787, provides: "In addition to and coördinate with the power granted to cities in subchapter 1 of this chapter, and any acts affecting such cities, all cities shall have the following powers:

"6. To supervise, regulate or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to de-

fine, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

"7. To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

"16. To regulate, control, and prohibit the keeping and management of houses or any building for the storage of gunpowder and other combustible, explosive, or dangerous materials within the city, and to regulate the keeping and conveying of the same, and to authorize and regulate the laying of pipes and the location and construction of houses, tanks, reservoirs, and pumping stations for the storage of oil and gas.

"26. To prevent and abate nuisances, whether on public or private property.

"27. To regulate and prohibit the carrying on of any business which may be dangerous or detrimental to health.

"28. To condemn and remove any and all buildings in the city limits, or cause them to be removed, at the expense of the owner or owners, when dangerous to life, health, or other property, under such just rules and regulations as it may by ordinance establish; and likewise to suppress any and all other nuisances maintained in the city."

In R. C. L., sec. 140, p. 834, it is said: "Aesthetic considerations have furnished the *motive* for the enactment of numerous regulations relating to the maintenance of billboards, etc. . . . Aesthetic purposes are not infrequently promoted by restrictions which are supported by other considerations quite within the domain of the police power, and it is the question whether a particular restriction is in fact so supported that affords the only ground for serious contention at the present day, for it is almost unanimously held that a municipality cannot, without compensation, by virtue of the police power alone, limit, for purely aesthetic purposes, the use which a person may make of his property," etc.

This expresses the uniform trend of legislation in regard to municipalities which are coming to be viewed not only as instrumentalities for the enforcement of law and order, but for the abolition of unsightly places and sounds and for the enhancement not only of the physical conveniences such as lights, water and sewerage, but for the preservation and improvement of the surroundings that will be pleasing to the eye and make the city more desirable as a place of residence. In short, the scope of the city government is not restricted to its primitive uses of the protection of life and limb and for the accommodation of business, but can embrace the preservation of the attractions as a place of

residence, though a regulation for the latter purpose alone cannot be sustained except upon compensation under the right of eminent domain.

The opinions and decisions of the highest courts of California, Nebraska, and Illinois holding valid ordinances regulating and prohibiting the establishment and maintenance of lumber yards, laundries, brick yards, etc., under the police power, in certain specified districts of a city, have been especially numerous. Also the Supreme Court of the United States has passed upon the validity of an ordinance almost in the exact terms of this before us. *Hadacheck v. Sebastian,* 239 U. S., 394; *Reinman v. Little Rock,* 107 Ark., 174, affirmed on writ of error, 237 U. S., 171. Among other cases sustaining ordinances in regard to lumber yards are *In re Montgomery,* 163 Cal., 457; Anno. Cas., 1914 A, 130 and notes; *Chicago v. Ripley,* 249 Ill., 466; 34 L. R. A. (N. S.), 1186. In *Ex parte Quong Wo,* 161 Cal., 220, the ordinance was sustained as to a laundry.

In *Reinman v. Little Rock,* 107 Ark., 174; 237 U. S., 171, it was a livery stable. In *In re McIntosh,* 211 New York, 265, it was sustained as to a garage; and in *Kittenbrink v. Withnell,* 91 Neb., 101; 40 L. R. A. (N. S.), 898, and in *Ex parte Hadacheck,* 165 Cal., 416; L. R. A., 1916 B, 1248, and notes; and in *Hadacheck v. Alexander,* 169 Cal., 259; also in *Hadacheck v. Sebastian,* 239 U. S., 394, an ordinance was sustained prohibiting brick yards to be maintained in certain districts or in certain distances of a residential section. It is worthy of notice that said ordinances were almost in exactly the terms of the one before us.

In *In re Montgomery, supra,* where the ordinance of Los Angeles prohibiting lumber yards in residential districts was in question, the Court said: "It is shown that certain wooden buildings near petitioner's lumber yard were occupied for business purposes, but the return seeks to show by affidavit and by photographic exhibits that the lumber yard is situated in the midst of a section of the city devoted almost exclusively to residences. In any view of the evidence we cannot say that the city council violated the large discretion vested in it with reference to police measures of the kind here considered, and unless such abuse of discretion appears, courts are never inclined to nullify ordinances on the ground of their unfairness. . . . While lumber yards are not nuisances *per se,* it takes no extended argument to convince one that such a place may be a menace to the safety of the property in its neighborhood for various reasons."

In *Reinman v. Little Rock, supra,* affirmed on writ of error, 237 U. S., 171, the ordinance of Little Rock prohibiting and regulating livery stables was considered by the Supreme Court of the United States, and as to the Federal questions involved, *Mr. Justice Pitney* for the Court says: "Granting that a livery stable is not a nuisance *per se,*

it is clearly within the police power of the State to regulate the business, provided it is not asserted arbitrarily or with unjust discrimination so as to infringe the Fourteenth Amendment"; and adds: "It is well within the range of the power of the State to so regulate in the residence section of a city thickly populated. While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary and operates uniformly upon all persons similarly situated in the particular district, it cannot be judicially declared a deprivation of property rights."

In all the *Hadacheck cases, supra,* it appears that the land was purchased about 1902, containing about 8½ acres, especially adapted for brickmaking, and there had been an investment of over $100,000; that when purchased the land was several miles from the city; that the business had been long in operation, but the city having grown in that direction it was taken into the city, and afterwards when a few houses or homes had been erected in the neighborhood, though at some distance from the brickyard property, the city passed an ordinance in terms very similar to the one before us. On writ of error to the Supreme Court, *Mr. Justice McKenna,* after passing on the fundamental Federal question involved along the same lines as *Mr. Justice Pitney,* as above quoted, said: "We think the conclusion of the Court is justified by the evidence, and makes it unnecessary to recite the many cases cited by the petitioner, in which it is decided that the police power of a State cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government—one that is the least limitable. It may seem, indeed, harsh in its exercise, and usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. That would preclude development and fix the city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all, it can only grow amid the environment of the occupations that are usually banished to the purlieus."

In the above cases the residential section had gradually encroached upon the business and commercial. In the case at bar the business and commercial, occupying 90 per cent of the water front on both rivers, and

in the course of years having gradually used and pushed into this small section, seek to encroach on the remaining 10 per cent.

It is well settled, in view of the increasing scope of municipal powers for the benefit of the public, that the police power extends to all the great public needs. *Camfield v. U. S.,* 167 U. S., 518, as to fencing; *Bacon v. Walker,* 204 U. S., 317.

Under what circumstances the police power should be exercised to prohibit carrying on certain classes of business within certain specified districts is a matter of police regulation within the scope of the municipal authorities. *New Orleans v. Murat,* 119 La., 1003 (sanitary regulations); *Barbier v. Connelly,* 113 U. S., 27; *Soon Hing v. Crowley, ibid.,* 703 (both prohibiting washing and ironing in certain localities).

It is primarily for the legislative body clothed with the police power to decide when and under what circumstances such regulations as the one in question are necessary and essential, and its determination in this regard, in view of its better knowledge of all the circumstances and of the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed by the courts unless it can be plainly seen that the regulation has no relation to the purposes above stated, but is a clear invasion of personal or property rights under the guise of police regulation.

To this effect are the following cases (which cite, among others, the cases *supra* of *Hadacheck, Kittenbrink, Montgomery, Quong Wo*): *Cemetery Asso. v. San Francisco,* 140 Cal., 226; *R. R. v. Omaha,* 235 U. S., 121 (holding valid a city ordinance requiring a railroad to build an overhead crossing); *Ins. Co. v. Lewis,* 233 U. S., 389 (regulating fire insurance rates); and there are many other cases.

The reasons actuating the legislative body in enacting the regulation ordinance need not necessarily appear from reading the ordinance itself. *Grumbach v. Lelande,* 154 Cal., 685; *Ex parte Tuttle,* 91 Cal., 591. It has been repeatedly held, and we think without any case to the contrary, that it is not necessary that a business be a nuisance *per se* to be regulated. Among these, besides the cases above cited, are *Rhodes v. Dunbar,* 57 Pa., 275; 98 Am. Dec., 221; *Welsh v. Swasey,* 193 Mass., 364 (limiting height of buildings); 23 L. R. A. (N. S.), 1160, and notes; *Offield v. R. R.,* 203 U. S., 372 (condemning shares of stock in a railroad company).

The exercise of the police power should largely have reference to the conditions of climate and soil and to the particular situation and needs of each community. *Oil Co. v. Ind.,* 177 U. S., 190; *Clark v. Nash,* 198 U. S., 361; *Bacon v. Walker,* 204 U. S., 311. The length of time during which a business has existed in a particular locality does not make its prohibition for the future unconstitutional. *R. R. v. Ill.,* 200 U. S.,

592; *People v. Lead Works,* 82 Mich., 471, nor is the size of the territory affected by the ordinance a criterion by which to judge its validity. *Miller v. Wilson,* 236 U. S., 373; L. R. A., 1915 F, 829.

That a statute will result in injury to some private interest does not deprive the Legislature of the power to enact it, though it would be invalid where the purpose is primarily the appropriation or destruction of property. *Enos v. Hanff,* 98 Neb., 245. A statute enacted within the police power will not be adjudged invalid because an omitted subject or locality might have been properly included. *People v. Schweinler Press,* 214 New York, 395; *In re Smith,* 143 Cal., 370.

The presumption is in favor of the validity of the ordinance and invalidity has not been imputed in this case by any evidence. On the contrary the evidence presented at the hearing, both before the board of aldermen and in the lower court, shows that the ordinance is necessary and proper for the comfort, safety and welfare of the public.

It is well settled that prohibition of industries or occupations in certain sections of cities is a valid regulation. *Cronin v. People,* 82 New York, 318; *Newton v. Joyce,* 166 Mass., 83; 55 Am. St., 385; *Shea v. Muncie,* 148 Ind., 14; *Ex parte Botts* (Texas Criminal Reports), 44 L. R. A. (N. S.), 629 (keeping hogs). The city has a right to regulate an occupation by confining it within prescribed limits. *Strauss v. Galesburg,* 203 Ill., 234; *White v. Bracelin,* 144 Mich., 332; *Ex parte Lacy,* 109 Cal., 326; 38 L. R. A., 640, and many cases above cited.

As to the section protected by this ordinance, not solely for aesthetic reasons, but by reason of menace from fire and disturbances by noises incident to the unloading of motor trucks and great barges by negroes and stevedores, and for the comfort and welfare of the citizens, and by the fact that it has been in all time past protected as a residential section, these were sufficient justification for the ordinance, apart from the fact that the ordinance is presumed to be valid, and there was no evidence to contradict the grounds upon which it was based. The fire risk from lumber yards and docks is greater no matter how piles are stacked than a dwelling house in the ordinary circumstances. To set aside and invalidate such an ordinance under these circumstances, which has been adopted by the board of aldermen upon the petition of a large number of its citizens, it must be shown that the city acted arbitrarily, unreasonably and unnecessarily.

The defendants also except to this method of proceeding by injunction against the enforcement of a city ordinance. We have several times held that no injunction or equitable proceeding will lie against a municipal ordinance. Remedy is never given in equity when it can be obtained at law. In *Wardens v. Washington,* 109 N. C., 21, it was held: "An injunction will not be granted to prevent the enforcement

of an alleged unlawful municipal ordinance; nor can an action be maintained which only seeks to have such ordinance adjudged void."

In *Scott v. Smith,* 121 N. C., 94, it was held that "an application for injunction against the enforcement of a town ordinance alleged to be void is a misconception of the remedy as a court of equity will not interpose when the plaintiff's proper remedy is a civil action at law for damages."

In *Vickers v. Durham,* 132 N. C., 890, the above two cases and also *Cohen v. Comrs.,* 77 N. C., 2, and *Busbee v. Lewis,* 85 N. C., 332, are cited for the proposition that an injunction will not lie against an alleged invalid city ordinance, the Court saying that a court of equity will never interpose when a party has an adequate and effectual remedy at law.

In *Paul v. Washington,* 134 N. C., 364, this matter is very fully discussed where there was an ordinance which required that saloons should keep the windows and doors open so that interiors would not be concealed; that no partition should be used, and prescribing other provisions in the nature of prohibition, and the Court held in a very elaborate opinion by *Mr. Justice Montgomery* (*Justice Walker* writing an able concurring opinion) that "an injunction does not lie against the enforcement of a municipal ordinance, the violation of which is a misdemeanor, for the reason that the State cannot be enjoined from the execution of its criminal laws."

In *Hargett v. Bell, ibid.,* 395, it was held that an injunction would not issue to test the validity of a town ordinance, citing, among other cases, *Cohen v. Comrs.,* 77 N. C., 2, in which *Reade, J.,* said: "We are aware of no principle or precedent for the interposition of a court of equity in such cases," citing, also, 1 High Inj., sec. 20, that "there is no equitable jurisdiction to enjoin the commission of crime." These authorities and others to the same effect are cited with approval in the well-known case of *S. v. R. R.,* 145 N. C., 521.

The same ruling that an injunction will not lie against the enforcement of a city ordinance when there is a remedy by defense on the trial of an indictment for the misdemeanor for violation of the ordinance or by action for damages, has been recognized in all jurisdictions. 21 L. R. A., 86 and notes; 38 L. R. A., 328 and notes, and 2 L. R. A. (N. S.), 632 and notes, and in other cases in our own Reports. Indeed the whole matter has been very recently discussed and the same proposition asserted, citing the above and other cases, in *Thompson v. Lumberton,* 182 N. C., 260, where it is held that "The enforcement of the criminal law, whether by statute or valid ordinance, made punishable as a misdemeanor under general statute, cannot be interfered with by the equitable remedy of injunction. When its violation is made a mis-

demeanor its validity may be tested by the one who is tried for violating it as a matter of defense, and we cannot invoke the equity jurisdiction of the court by an injunction on the ground that his remedy is inadequate, because an incorporated city or town cannot be made liable in damages in such matters."

It has been so often and fully settled that an injunction will not lie against the enforcement of an ordinance that we might well have been content to rest the decision in this case entirely upon that proposition, which has always been asserted and never denied by any decision in this State.

Owing, however, to the importance to the public welfare of the powers asserted by the ordinance in this case, we have very fully discussed and cited from the authorities in other States which hold that an ordinance for the purpose of the one in question is entirely valid and within the well recognized scope of the police power vested in the city authorities.

We are indebted for many of the authorities cited by us to the ability and industry of the eminent counsel for the defendant, in whose brief most of them can be found.

The decision appealed from must be

Reversed.

HOKE, J., concurring: I concur in the decision upholding the validity of the ordinance in question, and for reasons so well stated in the principal opinion; but I do not assent to the position that the validity of a municipal ordinance may never be tested by injunction proceedings. On the contrary, the authoritative cases are to the effect that when it appears that a law or ordinance is unconstitutional, and that an injunction against its enforcement is required for the adequate protection of property rights or the rights of persons against injuries otherwise irremediable, the writ is available in the exercise of the equitable powers of the court.

In the recent case of *Packard v. Banton,* Current Supreme Court Reporter, vol. 44, No. 10, at p. 258, *Associate Justice Sutherland* stated the principle as follows:

"Another preliminary contention is that the bill cannot be sustained because there is a plain, adequate, and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it to try the same right that is in issue there. *In re Sawyer,* 124 U. S., 200, 209-211; 8 Sup. Ct., 482; 31 L. Ed., 402;

Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S., 207, 217; 23 Sup. Ct., 498; 47 L. Ed., 778.

"But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.' *Truax v. Raich,* 239 U. S., 33, 37, 38; 36 Sup. Ct., 7; 60 L. Ed., 131; L. R. A., 1916 D, 545; Ann. Cas., 1917 B, 283. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson,* 263 U. S., ...; 44 Sup. Ct., 15; 68 L. Ed."

And in the case referred to of *Terrace v. Thompson,* Current Supreme Court Reporter, No. 44, p. 15, it is said:

"The unconstitutionality of a State law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford. *Boise Artesian Water Co. v. Boise City,* 213 U. S., 276, 281; 29 Sup. Ct., 426; 53 L. Ed., 796; *Walla Walla v. Walla Walla Water Co.,* 172 U. S., 1, 11, 12; 19 Sup. Ct., 77; 43 L. Ed., 341. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such case a person who is an officer of the State is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity," citing numerous cases in support of the position.

STACY and ADAMS, JJ., concur in this opinion.

J. F. MILLER AND J. T. HOGGARD v. CORNELL-YOUNG COMPANY.

(Filed 9 April, 1924.)

Principal and Agent—Evidence—Declarations of Agent—Accident—Hospital Expenses.

Evidence that one in charge of a construction company's camp, with authority to employ and discharge workmen, to supply them with provisions, etc., at the company's expense, and generally to look after their welfare, is sufficient *aliunde* to admit in evidence his declarations of

agency and to bind his principal upon an emergency to pay for his surgical and other expenses, at a hospital, of one of the employees who had met with a serious or fatal accident, in the course of his employment, irrespective of the negligence of his employer, upon his representation to the hospital authorities that his principal would pay them.

APPEAL by defendant from *Cranmer, J.*, at December Term, 1923, of NEW HANOVER.

This was a civil action. The facts material for a decision of the case are: The plaintiffs are physicians and surgeons and were engaged in the practice of medicine and surgery in the city of Wilmington, and, in connection with their practice, maintained a hospital, known as St. John's Sanatorium, in which hospital patients are received for treatment. The defendant is a corporation, organized and created under the laws of Georgia. That the defendant was engaged in certain construction work, building bridges in Pender County, N. C., and on 25 July, 1922, one of defendant's employees, Scott, was seriously and painfully injured while working for defendant company. He had a fracture of the spine, had a broken back, third and fourth lumbar vertebræ crushed, both legs were paralyzed. He was brought to plaintiffs' hospital for medical treatment, in an automobile, on a cot, by two men, Jones and Devane. Scott was helpless. One Hogan was superintendent of the defendant company in building the bridges. Jones was working for defendant company; he kept the time and paid off the hands. T. J. Henry, who had a grocery and hardware store in the country, near where the defendant company was doing the construction work, sold the defendant company a good deal of goods, covering a period of six or eight months. The goods were delivered to Mr. Hogan, the superintendent, and consisted of nails, rubber, roofing, axes, axe handles, and anything used pertaining to the work. Mr. Hogan looked after the work; he had sole charge of the operations of the work. He hired and discharged employees. The orders for these goods were given by either Mr. Hogan or Mr. Jones, and were paid for by defendant, by check from defendant's Macon (Georgia) office.

T. J. Henry testified, in part: "The goods we furnished to Mr. Hogan were furnished after Mr. Young, of the Cornell-Young Company, had made arrangements and authorized us to furnish them. The nearest I can recall it—I do not know whether it was the first or second time I ever saw Mr. Young—he came out and told me and my father—we were doing business together—that he had gotten the contract to build our bridges, and that he had brought Mr. Hogan along—the man who was going to do the work—and whatever Mr. Hogan needed to let him have, and to send the bill in, and they would foot it, and I gladly did it. It

was on the faith of that authority that I furnished the goods. Mr. Jones told me to send the bills in monthly, and I always did, and I always got my money. I was paid by check from the Macon office. I knew Mr. Young as being the head of the Cornell-Young Company. He came out and said he got the contract to build these bridges. That's all the acquaintance I had with Mr. Young. He stated, in substance, that Mr. Hogan was in charge of the operations of the Cornell-Young Company at that point."

J. F. Miller, one of plaintiffs, testified, in part: "Mr. Hogan came to the hospital while Scott was there, but I do not recall how soon after Scott was brought there that Mr. Hogan came—I think it was a few days. In the presence of Dr. Hoggard and myself, he made the statement that he wanted us to give him every care, everything that was needed, and if we needed any one else to call him in, and put on special nurses and do everything that was possible. It was necessary to perform a serious operation on Scott, and Hogan was notified, and requested us to get some one else to operate on Scott if it was needed. Mr. Scott was a patient of Dr. Hoggard, and was placed in the sanatorium I was in charge of. He had a broken back, pressure on the spinal cord, and was paralyzed from that point down. Mr. Hogan had been to the hospital more than once, and said he wanted Scott to have every care we could give him—special nurses, and everything we could do to make him comfortable and relieve his condition."

Hogan was at the hospital several times.

Dr. J. F. Hoggard testified, in part: "I had known Mr. Hogan before. Mr. Hogan did not come down with Scott. He later told me that the Cornell-Young Company was standing back of them and would pay every cent of it—to get the best attention for him. I stood responsible for all the bills, personally. Scott remained in the hospital until his death. A couple of days after he was admitted, Mr. Hogan came down and had a conversation with me. I do not know that he stated how Scott was hurt. He came several times, but I did not see him, except when he asked for me. He told me that Cornell-Young Company was back of it; that he was in their employ, and they wanted the best attention for him; that they treated their men that way. I spoke to him about the operation and told him that we had two surgeons here—Dr. Green and Dr. Hart—who could—he left it to me. I was the medical doctor in charge. . . . We operated on him as soon as we could. Mr. Hogan told me to notify the Cornell-Young Company, which I did."

Dr. G. C. Beard testified, in part: "I was called to attend an employee of the Cornell-Young Company by the name of Scott. I found him over on the highway, near Mr. George Devane's, where the Cornell-Young Company was carrying on construction work. Several of the

employees were with him and had moved him from the bridge up to the tent. I talked to several of the fellows that were attending him. I saw Mr. Hogan there; he was around and about, trying to relieve this young man in any way he could."

Q. "Did you receive any directions from anybody about attending Scott and what to do for him?" A. "I did."

Q. "From whom?" A. "From Mr. Hogan."

Q. "Now, what did he tell you?" A. "He told me, if this patient needed hospital attention, to send him in. I found Scott in a condition of shock. I made a physical examination, and the patient showed injury from the spine, with probable internal injuries. I treated Scott, and went back to see him that afternoon late. I saw him two or three times. On my second visit I saw Mr. Hogan. These people were strangers to me. I had not been on this practice long, and I had never been called there before; so I didn't stop to inquire any of their names. On my final trip there to see Scott I thought it was necessary for the patient to go to the hospital. I was talking to Hogan. I do not recall exactly what he said, but everybody agreed, both he and I, that that was the course to take with the case, and then we went over the preliminaries as to how to get him to the hospital. I had a discussion with Mr. Hogan about how to get him to the hospital. I instructed Mr. Hogan as to the details of putting the patient on a cot, getting him on a truck and taking him over to the train, or, if it was too late for the train, to bring him on in on the truck. I do not know who accompanied Scott to the train, but I do know that he was sent to the hospital. I do not know who was present at the time. I was at the hospital and went in to see Dr. Hoggard or Dr. Miller, and one of them went in with me. I communicated with Dr. Hoggard or Dr. Miller about sending Scott to Wilmington, and I wired the hospital to meet the patient. . . . I rendered a bill to the Cornell-Young Company for services, which was paid."

Dr. E. R. Hart (admitted to be an expert surgeon), testified, in part: "I recall Scott, who was injured while employed by the Cornell-Young Company in 1922. I saw him, at the request of Dr. Miller and Dr. Hoggard, and examined him some time after he had been committed to the hospital, though I do not recall just what date he was admitted. It was a few days, possibly two or three, before I saw him. I sent for Mr. Hogan, who came to see me. I explained to him Scott's condition. I told him it would be necessary for an operation—that he had a fracture of the spine. He wanted to know the condition of Mr. Scott, as well as I remember, and I said it was a fracture of the spine, which caused paralysis of the lower part of his body, and an operation would be necessary to attempt to remove what pressure there was on the nerves.

I was instructed to go ahead and do all that was necessary for Mr. Scott. The conversation took place in my office."

Several weeks after the operation the young man died—on 18 September, 1922.

There was further testimony as to the expenses in the hospital, special nurses, operation, medical attention, etc.

The defendant excepted and assigned error in allowing the testimony of numerous witnesses as to Hogan's declarations, and, on all the evidence, the refusal of the court below to grant a nonsuit.

There was a verdict for plaintiffs, and from the judgment rendered, defendant assigned errors and appealed to this Court.

Herbert McClammy, K. O. Burgwin, and E. K. Bryan for plaintiffs.
Rountree & Carr and George S. Jones for defendant.

CLARKSON, J. The defendant disclaimed any responsibility of any kind for Scott's injury, and, therefore, denied any obligation for his treatment, except for first aid, which the defendant had paid. The defendant contends that no one was authorized to contract this bill on its behalf, and therefore denies liability for same.

At the close of the evidence of the plaintiffs, the defendant moved for nonsuit, and, on the denial of the motion, asked the court to charge the jury to answer the issue in favor of the defendant, contending the facts are undisputed, and insisted that the whole question was one of law. The defendant objected to all the testimony as not being made competent against it. The matters at issue, defendant contended, could be discussed under the broad questions as to whether there is any evidence in this case against the defendant, and whether a nonsuit should not have been granted at the close of the evidence.

The defendant further contends: There is no evidence of agency, other than the alleged declaration of the agent himself; that the agency cannot be proven by the declarations of the agent; that the defendant is not liable for medical treatment of an injured employee where it is not responsible for the injury, except for first aid in an immediate emergency.

We do not think the entire evidence bears out the defendant's contentions. The defendant introduced no evidence, and the plaintiffs' evidence, on a motion for nonsuit, is taken in the light most favorable to the plaintiff. It does not appear from the record whether the defendant was liable for the injury to the young man, Scott, or not, but it does appear that he was in the employ of the defendant when injured, and, by inference, about his master's business; that it was a terrible, serious and fatal injury. It appears that a local doctor was at once called to attend to Scott's injuries, and that he was lying in a tent. The

defendant paid this local doctor. The local doctor, from the nature of the injury, found that it was necessary to send Scott to St. John's Sanatorium in Wilmington. This was done, and he was taken there by two of the employees of the defendant. He was sent there by Hogan, who told Dr. Hoggard, when Scott was in the sanatorium, that "Cornell-Young Company was back of it; that he was in their employ, and they wanted the best attention for him; that they treated their men that way."

Now, the question, under the admitted evidence, is: Who was Hogan and what was his authority? He was superintendent of defendant's construction works, engaged in building bridges. He had tents for defendant's employees. He hired and discharged the employees. He purchased goods and materials, and the defendant sent checks from Macon, Ga., its headquarters, to pay for the purchase of goods and materials thus bought. He was recognized as having authority to buy materials. It was in evidence that Hogan not only superintended the construction and entire work, but often did special work for the company; that he worked on the boiler of the engine when it was broken down, etc. Defendant, by sending checks from its home office, acknowledged that he had authority to buy material for the work, and employ and discharge the workmen used in building the bridges. Mr. Young, of defendant company, stated that Hogan was in charge of the operation of the defendant company at that point. The question presented to us is: Did Hogan have authority to employ plaintiffs to administer to a human employed by him when broken and fatally wounded in the work of his master, the defendant company? If Hogan was superintendent of the construction and had entire charge, had authority to buy materials and repair and mend the broken machinery and employ and discharge the workmen, did he not have implied authority to authorize plaintiffs to care for and administer to the broken and fatally wounded employee, under the facts and circumstances of this case?

"And he said unto them, What man shall there be among you that shall have one sheep, and if it fall into a pit on the Sabbath day, will he not lay hold it and lift it out? *How much, then, is a man better than a sheep?*" St. Matthew, 12:11, 12.

We think that Hogan had implied authority, under the facts and circumstances of this case, and acted within the scope of his employment in having plaintiffs care for and operate on the fatally wounded employee of defendant, and that plaintiffs were entitled to reasonable compensation for their services. We think there was sufficient evidence *aliunde* to make Hogan's declarations competent.

In *Hunsucker v. Corbitt, ante,* 503, it was said: "Admissions by agents, made while doing acts within the scope of the agency, and

relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ,* but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admission will be received." Lockhart's Handbook on Evidence, sec. 154, citing numerous cases.

We do not think the case relied on by defendant (*Adams v. R. R.,* 125 N. C., 565) in point. In that case the Court said: "There are some emergency instances in which the conductor may engage a physician to nurse the defendant's servants or passengers when injured, but, as to trespassers on the defendant's road, no such authority is found to exist." In that case the party injured was a trespasser; in the present case, an employee.

That case recognizes the duty of a master, when a servant is injured in his employment, to engage a physician—in emergency instances. We think there could not be a stronger emergency instance than the instant one. The local doctor thought so by sending the employee, with the authority of Hogan, the superintendent of defendant's construction works, to plaintiffs' sanatorium. *Sanatorium v. Yadkin River Co.,* 167 N. C., 326.

We think the doctrine laid down in 14 A.—C. J., 434, correct in principle. It is said there: "A corporation is liable for hospital charges for the care of a person injured through instrumentalities used by it, where its officers and agents, with ostensible authority, direct the hospital authorities to take charge of such person and to continue the services, although no legal or moral obligation rests upon the corporation to care for him. An assistant to the general manager, with authority to look after the corporate interests in his business, has ostensible authority, in the absence of the manager, to contract in an emergency for such hospital services."

In *Scott v. Monte Cristo Oil etc. Co.,* 15 Cal. App., p. 453, it is said: "Where the corporation defendant, though having a principal place of business at San Francisco, was engaged in developing its oil lands in Kern County, and had placed its president in supreme local authority at its works, it is held that he had presumed authority, where an employee was seriously injured thereat and became unconscious, to engage the services of a physician and surgeon, who found that he needed the operation of trephining, and to order him to be sent to a sanatorium for such operation, and to promise that the corporation would pay all bills therefor, and for nursing required thereat, and all bills required for his care at such sanatorium."

The cases seem to be conflicting in different jurisdictions; but, after a thorough and careful consideration of the decisions, *pro* and *con,* we are led to the conclusion that, under the facts and circumstances in this

case, it would have been an act of inhumanity, with the terrible injuries this young man had received in the employment of the defendant company, not to have sent him to the sanatorium for medical attention and treatment. We think the superintendent, Hogan, was in the scope of his authority and acted with good judgment and discretion. It was an emergency case and a continuing one.

We can find

No error.

R. D. JONES ET AL. v. BOARD OF EDUCATION OF ROBESON COUNTY AND BOARD OF COUNTY COMMISSIONERS.

(Filed 9 April, 1924.)

1. Schools—Consolidation—Taxation—Bonds—Statutes.

C. S., 5526, applies primarily to the consolidation of nonspecial-school-tax territory; and in order to consolidate existent school-tax districts having different rates, by extending the limits of some of them to include others, section 5530 requires that a majority of the committee or trustees of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid.

2. Same.

Where the consolidation of existing school districts with various rates of taxation attempted under the provisions of C. S., 5530, is invalid, an election thereafter held under the provisions of C. S., 5473, as amended by Laws 1921, ch. 179, sec. 1, cannot relate back and validate the consolidation and the tax to be levied and bonds to be issued thereunder.

APPEAL by plaintiffs from a judgment upon the pleadings by *Lyon, J.*, at chambers.

Prior to 6 March, 1922, there were five separate public-school districts in Thompson's Township, Robeson County, known as White Public-School districts Nos. 6, 8, 9, 10, and 11. Each was a special-taxing district, in which a special tax had been voted, as follows:

(a) In District No. 6, a special tax of 30 cents on the $100 valuation of property.

(b) In District No. 8, a special tax of 30 cents on the $100 valuation of property.

(c) In District No. 9, a special tax of 25 cents on the $100 valuation of property.

(d) In District No. 10, a special tax of 20 cents on the $100 valuation of property.

(e) In District No. 11, a special tax of 10 cents on the $100 valuation of property.

On 6 March, 1922, the board of education made an order for the consolidation of these districts into one, to be known as Thompson's Graded School District. At the request of the board of education, the board of commissioners then called an election, which was held on 6 May, 1922, in the consolidated district, upon the question of issuing twenty-year bonds in the sum of $25,000 for building purposes, and of levying an additional special tax of 30 cents on the $100 valuation of property, and a majority of the qualified voters voted for said bonds and tax. On 5 June, 1922, the board of education made an order revoking the consolidation of the several districts, and the board of commissioners declared null and void the election which had been carried for the bonds and special tax. These orders were made in consequence of the construction given by these boards to one or more decisions of the Supreme Court. On the same day the board of education consolidated districts 6 and 8, which had levied the same tax, and considered petitions praying that the graded-school district (composed of 6 and 8) be enlarged by adding thereto districts 9, 10, and 11, and that an election be held in these three districts on the question of making their respective tax rates equal to those in the consolidated district. The board of commissioners ordered such election to be held, and in each district the election resulted in raising the tax to 30 cents. Accordingly, on 4 September, 1922, districts 9, 10, and 11 were consolidated with districts 6 and 8. On 5 March, 1923, the board of commissioners made an order in effect declaring the bonds and special tax voted in the special election of 6 May, 1922, to be valid, and annulled "all proceedings of this board since 6 May, 1922, relative to said bonds." It is admitted that the trustees of the Thompson Graded School District (districts 6, 8, 9, 10, and 11) are preparing to issue and sell the bonds ($25,000) and to levy the special tax voted in the election of 6 May, 1922.

The plaintiffs contend that the Thompson Graded School District had not been legally consolidated or established when the election of 6 May was held, and that the bonds, therefore, cannot be issued nor the tax levied. His Honor held that the bonds, when issued and sold, will be valid and the tax collectible, and vacated the restraining order. The plaintiffs appealed.

J. E. Carpenter and McKinnon, Fuller & McKinnon for plaintiffs.

L. R. Varser, Dickson McLean, and H. E. Stacy for defendants.

ADAMS, J. The order first consolidating the several school districts was made on 6 March, 1922, and the election purporting to authorize the issuance of bonds for the consolidated districts and the levy of a special tax was held on 6 May, 1922. On 5 June the order consolidating these districts was rescinded and the election declared void, whereupon districts 6 and 8, having the same tax, were combined and a petition was filed with the board of education praying that these two districts be enlarged by adding thereto districts 9, 10, and 11. The election was held and the tax in each of the three districts was raised and made uniform with the tax in the two combined districts, and on 4 September the five districts were consolidated and designated "Thompson's Graded School District."

The plaintiffs contend that the first order of consolidation was illegal even if the board of education had no power to revoke it or had power to reinstate it (as it attempted to do) and that the election purporting to authorize the bonds and the special tax was ineffective even if the board of commissioners had no power to declare it void. The appeal therefore presents the question whether the first order of consolidation was valid.

In the five districts a special tax had been levied—in the first two thirty cents on property valued at one hundred dollars, and in the last three twenty-five cents, twenty cents, and ten cents respectively; and on the question of consolidation no election was held until 4 September, 1922, about four months after the election which resulted in favor of the bonds and the special tax. The order of 6 March, consolidating the five districts, cannot be sustained unless by virtue of section 5526 or 5530 of the Consolidated Statutes, or by the act of 1921.

In our opinion it cannot be sustained under section 5526 because this section "was intended to apply primarily to cases where new districts are created or formed, in the manner prescribed therein, out of territory exclusive of special-tax districts, or at least out of territory having the same existing school tax or taxes." *Perry v. Comrs.*, 183 N. C., 387.

It is also clear, we think, that it cannot be upheld under section 5530. The plaintiffs allege, it is true, that at a meeting held on 6 March, 1922, the board of education made an order consolidating the territory embraced within districts 6, 8, 9, 10 and 11, and this is admitted by the defendants; but it is also alleged that there were differing tax rates in the several districts, and upon these allegations arises a well-defined question of law. Besides, there is no allegation that a majority of the committee or trustees of either of these districts had filed a written request with the board of education to enlarge its boundaries or that the other provisions of the statute had been complied with. If the statute contemplates nothing more, the extension of the bounda-

ries of a local taxing district by taking in contiguous nontaxing territory, obviously it is inapplicable here because all the districts had levied a special tax. If the election therein referred to should be construed as applying to the consolidation of several contiguous districts, levying different tax rates in order to secure uniformity, still no election was held before the consolidation was effected; and there is no provision in this section that upon such consolidation only the lowest rate should be levied and collected. *Paschal v. Johnson,* 183 N. C., 129; *Perry v. Comrs., supra; Hicks v. Comrs.,* 183 N. C., 394.

What bearing, then, has the act of 1921 on the consolidation of these districts? Section 5473, as amended by Public Laws 1921, ch. 179, sec. 1, provides that the county board of education may consolidate local-tax districts having different special tax rates for schools; but it is further provided that the rate on any consolidated districts created from local-tax districts having different local tax rates shall be made uniform by the county commissioners upon the recommendation of the county board of education, and that no taxpayer in such consolidated districts shall be required to pay a higher special tax than that voted originally in his district. This is probably the statute on which the defendants chiefly rely; but we find nothing in the record to show that the county board of education ever made the necessary recommendation to the board of county commissioners or that the commissioners ever attempted to make uniform the rate on the consolidated districts. If such recommendation had been made it is altogether probable that the district paying the highest rate would have objected; at any rate, this inference is reasonable in view of the subsequent election to increase the lowest rate to the highest.

Upon a careful consideration of the record we are convinced that the order of consolidation made on 6 March, 1922, was not made in compliance with law, and that the election in pursuance thereof was not effective. If it be conceded that the consolidation of 4 September in pursuance of the election ordered on 5 June was held as the law requires, still it could not relate back and validate a void election purporting to sanction or authorize the issuance of bonds and the levy of the special tax. The defect is not cured by the order made by the board of commissioners on 5 March, 1923, in reference to the election held on 6 May, 1922. We see no good reason, however, why relief may not be sought in another election. The judgment is

Reversed.

SEABOARD AIR LINE RAILWAY COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY v. GEORGE H. CRAFTS & COMPANY AND THE BONDING AND INSURANCE COMPANY OF BOSTON.

(Filed 9 April, 1924.)

1. Contracts — Material Furnishers — Principal and Surety — Liens — Statutes.

The payment by the railroad company direct to those who had valid claims for materials, etc., furnished the contractor for the construction of a bridge, upon notice given, is a proper charge against the surety on a bond given for the faithful performance by the contractor, conditioned that the railroad company might at any time pay any moneys directly to those having claims for materials furnished for the purpose of the contract, without reference to the statutory lien law.

2. Same—Negligence—Personal Injuries.

Where a railroad company has paid a judgment obtained against it for the negligence of its contractor for failing to furnish his employees a safe place to work in the construction of a bridge, the surety on the contractor's bond is liable when the contract provides that the contractor shall save the railroad harmless for damages resulting to employees from accidents, injuries, etc., and the provisions of the indemnity bond are to save the railroad company harmless from liens of material, labor, or other liens, and "in all other respects in said agreement provided for."

3. Same—Appeal and Error—Record—Judgments—Estoppel.

A decision of the Supreme Court on appeal in an action by an employee against a contractor for the erection of a bridge for a railroad company, wherein the surety bond is not set out, holding that the surety is not liable to the railroad company for the contractor's negligence, is not an estoppel by judgment in the railroad's subsequent action upon the bond to recover the amount of damages it has paid the employee when it is made to appear on a second appeal, by a full and complete record, that the damages sought were in the contemplation of and provided for in the surety bond.

STACY, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Cranmer, J.*, at December Term, 1923, of NEW HANOVER.

This was an action brought by the railroad companies named against Crafts, the contractor, and the bonding company to recover the amount which the plaintiffs claimed that they had to pay for the construction of a bridge at Wilmington over and above the cost for which Crafts had agreed to construct it in his contract.

None of the counts or amounts of claims were in dispute, but the questions involved are matters of law whether the bonding company is responsible for the items claimed by the railroad companies. The case was referred to a referee who stated the account, finding the facts and

conclusion of law. No exceptions were filed to the findings of fact by either party, but the railroad companies and the bonding company filed exceptions to certain of the referee's conclusions of law.

Before the bridge was completed the contractor defaulted in his contract and the railroad companies had to take over the work and complete it for their own account. Upon the findings of fact, which are not excepted to, the railroad companies were to pay under the terms of the contract a total of $23,355.51, and at the time of the default the contractor had been paid $17,551.65, leaving a balance due the contractor, if he had completed the job, of $5,803.86.

The actual cost to the railroad companies to complete the construction of the bridge was $4,396.49, but the railroad companies paid other bills of Crafts, which the defendants contend constituted new liens or encumbrances to the amount of $3,887.29, making a total paid by the railroad companies, after Crafts had defaulted, of $8,283.78, and the railroad companies sued the bonding company for this difference of $2,479.92.

After this suit had begun, a judgment was obtained by Robert Gadsden against the railroad companies for personal injuries while at work as a laborer under Crafts, and the plaintiffs amended the complaint, after paying the judgment, asking to recover of the defendant bonding company the amount recovered by Gadsden of $1,515.93.

The defendant bonding company contends that it cannot be charged with the payment of the bills due by Crafts which were no liens or encumbrances against the property, and that the railroad companies should have paid to the creditors of Crafts, after due notice, only their respective pro rata part of the funds in this case, and that their bond did not obligate the bonding company to pay the Gadsden judgment for personal injuries.

The court held with the defendant upon both these propositions, and the plaintiffs appealed.

John D. Bellamy & Sons for plaintiffs.
J. O. Carr and Herbert McClammy for bonding company.

CLARK, C. J. There is no exception to the findings of fact. Crafts abandoned his contract on 12 December, 1914, giving notice to the surety company to that effect, and at that time there was due to Crafts $4,348.96, but on 16 July, five months before the abandonment of the contract, creditors for material, etc., had given notice of claims to the amount of $3,887.39. No liens had been filed but notice of the claim in every instance was given to the plaintiff railroad companies, and these claims were paid from time to time in full after the abandonment of the work. The bond given by the defendants provides that the rail-

road companies "may at any time . . . pay any moneys directly to the employees and others having claims and demands against the party of the first part for work done and material furnished for the purpose of this contract." This provision was to protect laborers and material men so they could get their money whether there is enough left to complete the contract or not, and this contract is an exact duplicate of the similar provision in the Government contracts. National Surety Co., 92 Fed., 549, and 100 Fed., 699.

The language of the section is that the companies may at any time pay any moneys for labor and material directly to the claimant, and if there is not money enough left to complete the contract, the contractor or his surety must spend enough to complete it. This is a just and reasonable construction of the terms of the contract, and the lien law of the State does not forbid this construction of the contract between the railroads and the contractor and his surety.

The court below erred in holding that "the bond of the Massachusetts Bonding Company does not embrace liability to an employee for personal injuries sustained while working under the contract by reason of the negligence of Crafts." The court also erred in setting aside the conclusion of law of the referee that "said bond does cover matters affecting the proper and faithful execution of the work thereunder by Crafts and loss, through inferior work therein or thereunder by said contractor, resulting to said railroad corporations and culminating in a judgment lien being placed on such work or property, which plaintiffs allege as the cause of action in their amended complaint."

The surety bond covers the liability of the plaintiff company for a judgment obtained by Gadsden, an employee of Crafts, for personal injuries sustained by him from defective workmanship in erecting the bridge. The findings of fact show that the accident was due to defective and inferior work on the part of Crafts in that he erected a scaffold with a board having a knot in it which could not sustain the weight of Gadsden and his load, and the breaking of which caused his injury, for which judgment was obtained against Crafts therefor.

The bond was given to secure the performance by the contractor "of the covenants of the contractor, and to indemnify and save harmless the Seaboard Air Line and the Atlantic Coast Line Railroad companies against any and all labor and material *or other liens* placed upon said work by reason of any act, default or omission of the contractor . . . or otherwise on account of the contractor . . . and further indemnify and save harmless the companies, as their respective interests may appear, in all other respects in said agreement provided for."

The contractor agreed "to use and provide all proper, necessary and sufficient precautions, safeguards and protection against the occurrence

of any *accidents, injuries, damages,* or hurts or delays to any person or property during the progress of the construction of the work, and . . . to indemnify and save harmless the companies from and against the payment of any sums of money by reason of all or any such accidents, injuries, damages or hurts or delays that may happen or occur upon or about said works." The judgment by Gadsden was obtained for damages sustained by reason of defective workmanship in placing an inferior plank for the workmen to walk on with heavy loaded barrels of concrete in the prosecution of the work.

The court below also erred in holding that "the railroad companies had no right to apply or pay the sum of $1,407.37 or any part thereof where no lien had been filed." The railroad company had paid out, according to the findings, $2,941.59 to complete the contract besides the $3,887.29 which they had already paid besides the $1,515.93, making the total of $8,344.81, deducting from which the amount due the contractor at the time of the default of $5,803.86, leaving a balance of $2,540.95 (which includes the Gadsden judgment of $1,515.93 obtained against the plaintiffs, which they were forced to pay), and the court should have directed entry of judgment for that amount.

The defendants contended that in the case of *Gadsden v. Crafts,* 171 N. C., 288, this Court said: "It will be seen that the contract of the bonding company could not be construed as embracing liability for personal injuries sustained by an employee by reason of the negligence of the said contractor. Such liability is not nominated in the bond and does not come within the scope of the obligation of the bonding company which covers matters affecting only the proper and faithful execution of the work and against liens, and does not embrace liability for torts." In that case the entire bond was not set out and the court did not pass any judgment which would be an estoppel in this case in an action by the railroad companies and the bonding company in a matter where the bond is now set out in full and it appears unequivocally the bonding company has contracted, as above stated, for liability "against the occurrence of any accidents, injuries, damages or hurts or delays to any person or property during the progress of the construction of the work and . . . to indemnify and save harmless the company from and against the payment of any sums of money by reason of all or any such accidents, injuries, damages or hurts or delays that may happen or occur upon or about said work."

In this action by the plaintiffs against the bonding company the bond is set forth and does fully cover the amount ascertained and adjudged against Crafts in the case of *Gadsden v. Crafts,* in which the liability

of said bonding company was not presented nor the bond filed in full, and therefore the judgment in that case is not an estoppel against the plaintiffs in this action.

Judgment will be entered below in favor of the plaintiffs as above indicated.

Reversed.

STACY, J., took no part in the consideration or decision of this case.

THE CITIZENS BANK AND TRUST COMPANY v. J. J. KNOX, E. C. WOODBURY AND W. E. MAULTSBY, PARTIES TRADING AS EL PASO LUMBER COMPANY.

(Filed 9 April, 1924.)

1. Actions—Bills and Notes—Payment—Burden of Proof.

Where the plaintiff produces in evidence the defendant's note, uncanceled, upon which suit was brought, the burden is on the defendant to show that he had paid it, in order to establish this as a defense.

2. Banks and Banking—Drafts—Collection—Actions—Notes—Discharge of Debt Pro Tanto—Rule of Prudent Man.

Where a bank accepts for collection a bill of lading attached to a draft, upon agreement that the money would be applied to a note the drawer owed it, the bank is under legal obligation to exercise the care of an ordinarily prudent man to collect the draft and apply its proceeds in accordance with its agreement; and an instruction upon a trial on the note that if the jury found that the draft had not been paid to answer the issue in favor of the plaintiff bank is reversible error, for whatever moneys the plaintiff should have received under the rule stated would be a discharge *pro tanto* of the note it sued on.

STACY, J., took no part in the consideration or decision of this case.

CIVIL ACTION tried before *Grady, J.*, and a jury, at September Term, 1923, of NEW HANOVER. Appeal by defendants.

The plaintiff bank instituted this suit against the defendants to recover the sum of $500 and interest, balance due on a note made 21 March, 1921, by Widemer Lumber Company and signed by A. N. Harper, president, at 10 days, for $800. The note was endorsed by J. J. Knox for himself and on behalf of the other defendants, partners. They obtained from the plaintiff $800, less the usual discount. On 13 April, 1921, $300 was paid on the note.

The Widemer Lumber Company is insolvent. The defendants, as a defense to the action, say: "That they placed in the hands of the plaintiff a draft upon the Widemer Lumber Company for the sum of $500 with bill of lading attached, said bill of lading showing a shipment of

lumber to the said Widemer Lumber Company of the value of $500, which draft was collected by the plaintiffs and applied to the note that the plaintiff is now suing upon, as these defendants allege, and as the same was not applied, that the sum of $500 is now in the hands of the plaintiff, belonging to these defendants, which should have been credited to said note."

J. J. Knox, a witness for defendants, testified in part, that the El Paso Lumber Company had dealings with the Widemer Lumber Company, and it owed his company about $2,000. The note was endorsed by him on 21 March, 1921. When this draft of $500 was sent in he first went out to see Mr. Harper, president of the Widemer Lumber Company. "In consequence of what Mr. Harper told me I went to the bank and asked Mr. LeGrand, the cashier, if he had a draft in there with a bill of lading attached for a carload of lumber to be applied to the El Paso Lumber Company note, and he said 'Yes.' Mr. LeGrand said there was a bill of lading there with the draft attached, with the understanding that it should be applied to this $500 note, as $300 had already been paid on the note. The $500 was never applied to the note. I do not know whether the bill of lading was ever surrendered by the bank. I went to see Mr. LeGrand again after that, and he told me that a part of the draft was taken out for indebtedness that was owing on the shipment. . . . I went back to see Mr. Harper about that, and Mr. Harper said that he did not owe anything."

"Q. Was any portion of that money, of the $500 of that draft with the bill of lading attached for the lumber that was shipped, ever applied to this note by the Citizens Bank? A. Not to my knowledge."

A. N. Harper testified in part: "I recall this note of $800 that was signed by the Widemer Lumber Company, and that is my signature. The money was borrowed for the purpose of applying to an indebtedness that I was due to the El Paso Lumber Company. To the best of my recollection the credit of $300 was paid by the Widemer Lumber Company. Well, we owed the El Paso Lumber Company some money, and Mr. Knox had been out there once or twice about the balance, and I told him—I taken the bill of lading into the bank, signed the bill of lading by the Coast Line, and told them I wanted the draft on the party I was shipping the lumber to, and attached a draft on the bill of lading, and the proceeds were to go to the credit of this note. I gave those instructions to one of the bank officials. I am not sure if it was Mr. LeGrand or Mr. James."

The other testimony is not necessary to be set forth for the decision of the case, and the only assignment of error material to be considered is the following to the charge of the court below: "The records of the bank have been introduced in evidence here showing that the draft was

not paid and that it was returned to the bank unpaid. Now if, in the face of that record, you find that that draft has been paid you will answer the issue Nothing; if you find it has not been paid you will answer it $500 with interest. Go back and see how you find it. The bill of lading hasn't got anything to do with it." The jury returned a verdict for plaintiff for $500 and interest.

The court gave judgment for the plaintiff and the defendants assigned error, and appealed to this Court.

Wright & Stevens for plaintiff.
Herbert McClammy for defendants.

CLARKSON, J. The Widemer Lumber Company owed the plaintiff bank a balance of $500 on a note endorsed by J. J. Knox for his firm, El Paso Lumber Company; A. N. Harper was president of the Widemer Lumber Company. Harper testified: "I taken the bill of lading into the bank, signed the bill of lading by the Coast Line, and told them I wanted the draft on the party I was shipping the lumber to, and attached a draft on the bill of lading, and the proceeds were to go to the credit of this note. I gave these instructions to one of the bank officials."

It is well settled that where one signs a note and the plea of payment if set up as a defense, the burden is on the defendant to show payment. *Ellison v. Rix,* 85 N. C., 80.

The defendant's testimony, if believed, tended to show in the instant case that to pay the note a draft of $500 with bill of lading attached was turned over to the officials of plaintiff bank. The bill of lading showing a shipment of lumber by the Coast Line Railroad, and a draft with the bill of lading attached, were left with plaintiff bank, and the proceeds were to go to the credit of the $500 note. The court below in the charge told the jury "The bill of lading hasn't got anything to do with it." In this we think there was error. We think the court should have instructed the jury that if from the evidence they found the facts to be that A. N. Harper, president of the Widemer Lumber Company, turned over to an official or officials of plaintiff bank a draft of $500 with bill of lading attached showing a shipment of lumber by the Coast Line Railroad, with the understanding and agreement that the proceeds were to go to the credit of the $500 note on which J. J. Knox and others were endorsers, the burden was on the bank to show due diligence and care, that is, such diligence and care as a man of ordinary prudence would exercise under the same or similar circumstances in collecting or enforcing the draft with the bill of lading attached. If the plaintiff did not exercise this care and diligence, and by reason thereof the value of the lumber at the time the bill of lading

attached to the draft was lost, the defendant J. J. Knox and other defendants would be entitled to credit for the market value of the lumber, at the time it was lost, on the note sued on.

"An order drawn by the debtor upon a third person in favor of the creditor, for the payment of money or goods, is not a payment of the debt unless such order has been actually paid or accepted by the creditor as a discharge of the debt *pro tanto*. It is not enough that the creditor accepts the order unless he accepts it as a payment. On the other hand, if the order is accepted by the creditor as payment, or is actually paid to the creditor, or if the creditor agreed to accept such an order when the debt was created, the debt is extinguished *pro tanto. At any event, where due diligence is not used in collecting or enforcing the accepted order, whereby the claim is lost, the order is deemed a payment.*" 30 Cyc., p. 1191. (Italics ours.)

Page on the Law of Contracts (2 ed.), vol. 5, sec. 2814 (in part), lays down the just rule: "Omission of the creditor to use proper diligence in collecting the draft will make the draft operate as a payment to the extent of the injury caused."

Nash, J., in *Ligon v. Dunn,* 28 N. C., 137, says: "Payment may be made also in a bill of exchange or a promissory note though the receipt of neither is in itself a payment, for neither is money. But if received, and the creditor *do not use the necessary diligence to get it paid, the defendant will be discharged.*" (Italics ours.) *Terry v. Robbins,* 128 N. C., 142.

"When this case was before us upon the defendant's former appeal (*Mauney v. Coit,* 80 N. C., 300) we stated the rule, applicable to the facts then appearing to be, that 'if the drafts were given and received, for and in closing up the account, and were afterwards accepted by the company, it was the duty of the plaintiffs to present them at maturity for payment, and if not paid in a reasonable time, to take proper steps for their collection, and if they failed to do this and the drafts became worthless, it would in law be a discharge of the original debt, that is, of course, if they were lost by reason of the neglect of the holders to proceed to collect and could have been collected by the use of reasonable diligence on their part.' It is now, however, shown that any effort to enforce payment by action would have been fruitless in consequence of the insolvency of the acceptor, and the law does not require the holder to do a 'vain thing.'" *Mauney v. Coit,* 86 N. C., 471.

From the view we take of this case there must be a new trial, so that the jury can pass on the facts under the law as we interpret it to be. For the reasons given there must be a

New trial.

STACY, J., took no part in the consideration or decision of this case.

IN RE ADMINISTRATION OF THE ESTATE OF FRANK RYAN, DECEASED.

(Filed 16 April, 1924.)

Executors and Administrators—Letters of Administration—Petition to Vacate—Procedure.

Where letters of administration have been granted upon the estate of a decedent by the clerks of the court of two different counties, it is a proper procedure to petition one of these clerks to vacate the letters granted by the other; and where his order allowing the prayer of the petition finds both the facts and intent of domicile to have been within the county wherein the petition was filed, his ruling will be upheld.

APPEAL by respondent from *Cranmer, J.*, at December Term, 1923, of NEW HANOVER.

Petition to vacate letters of administration. From a judgment granting the petition respondent appeals.

John D. Bellamy & Sons for petitioner.
Rodgers & Rodgers for respondent.

STACY, J. On 14 August, 1922, E. T. Kemp was appointed administrator of the estate of Frank Ryan, deceased, by the clerk of the Superior Court for New Hanover County, upon representation duly made to him that the deceased was domiciled in said county at the time of his death.

On 25 September, 1922, H. J. Marshall was appointed administrator of the estate of Frank Ryan, deceased, by the clerk of the Superior Court for Pender County, upon representation duly made to him that the deceased was domiciled in said county at the time of his death.

This proceeding is brought by H. J. Marshall, who was appointed administrator of the estate of Frank Ryan by the clerk of the Superior Court for Pender County, to have the letters of administration, granted to E. T. Kemp by the clerk of the Superior Court for New Hanover County, vacated and set aside, or revoked, upon the ground that the deceased was never a resident of, or domiciled in, the county of New Hanover.

Upon competent evidence, the clerk found, among other things, that Frank Ryan, at the time of his death, was a resident of, and domiciled in, the county of Pender, State of North Carolina; that he had never been a resident of, or domiciled in, New Hanover County. The petition to recall or to revoke the letters of administration theretofore issued by him to the respondent, E. T. Kemp, was thereupon allowed and judgment entered accordingly. The matter was heard *de novo* on appeal

from the clerk, before his Honor, E. H. Cranmer, who, after considering the evidence, approved the clerk's findings and affirmed his judgment. In this we find no error.

Domicile is a question of fact and intention; and upon the facts found here, the judgment must be upheld. *In re Martin,* 185 N. C., 472. See, also, *Reynolds v. Cotton Mills,* 177 N. C., 412, where the subject is fully discussed in an opinion by *Walker, J.*

Affirmed.

J. H. TONKINS, ADMR., v. NATHAN M. COOPER.

(Filed 16 April, 1924.)

Negligence—Wrongful Death—Survival of Action—Executors and Administrators—Statutes.

Where the person who is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor or administrator of the deceased defendant, under the provisions of C. S., 160.

APPEAL by plaintiff from *Lane, J.,* at February Term, 1924, of GUILFORD.

Civil action, to recover damages for an alleged negligent injury and wrongful killing. From a judgment dismissing the action, on the ground that it had abated, the plaintiff appealed.

R. C. Strudwick and Hines A. Jones for plaintiff.
No counsel contra.

STACY, J. This is an action to recover damages for an alleged negligent injury and wrongful killing of plaintiff's intestate. Suit was instituted 28 April, 1922, within thirty days after the alleged wrongful death, and the complaint was duly filed on 12 May, 1922. Defendant filed answer, 18 May, 1922, denying all the material allegations of the complaint. In January, 1924, the defendant died. At the February Term, 1924, of Guilford Superior Court, plaintiff suggested the death of the defendant and moved that his administratrix be made a party defendant. Counsel for the administratrix of the defendant resisted the motion, upon the ground the action abated on the death of the defendant, and they therefore moved that it be dismissed. This motion was allowed and judgment entered accordingly. Plaintiff excepted and appealed.

There was error in holding that the action abated on the death of the defendant, and in dismissing the suit. C. S., 160, provides that when the death of a person is caused by the wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, "and his or their executors, administrators, collectors, or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator, or collector of the decedent," etc. Under the terms of this statute, suit may be brought against the executors, administrators, or collectors of the person negligently or wrongfully causing the death of plaintiff's intestate, where such person dies within one year after the wrongful death; and the fact that suit was brought within the year and while the alleged wrongdoer was living would not change the rule of law.

There is nothing in sections 159, 162, or 461 of the Consolidated Statutes which militates against this position.

Reversed.

STATE v. FLOYD VALLEY.

(Filed 16 April, 1924.)

1. **Criminal Law—Statutes—Constitutional Law—Taxation—Trades—Classification—License.**

   The Legislature has constitutional authority to select and classify occupations and trades for the purpose of taxation, and to impose a license tax on the business of procuring laborers in this State to send into another State to work there, and make it a misdemeanor, imposing a fine or punishment for those who conduct this business in violation of the statute.

2. **Instructions—Appeal and Error.**

   An instruction which is correct as to its related parts, upon the matter excepted to, will not be held for reversible error because of a portion thereof, so related, excepted to, if standing alone, is erroneous.

3. **Criminal Law—Taxation—Trades—Misdemeanors—License—Burden of Proof.**

   Where the defendant is on trial for a misdemeanor in violating a statute requiring one engaged in the business of hiring laborers in this State to work in another State to pay a tax and obtain a license therefor, the burden is on the defendant to show that he had obtained the license required by the Statute. *S. v. Lowe, ante*, 524, cited and distinguished.

APPEAL by defendant from *Shaw, J.*, at June Term, 1923, of DAVIDSON.

STATE *v.* VALLEY.

Criminal action, for unlawfully procuring laborers for employment out of the State without having obtained license for such business. Verdict, guilty. Judgment. Defendant excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney General Nash for the State.

Phillips & Bower and F. L. Webster for defendant.

HOKE, J. The Revenue Act of 1923, ch. 4, sec. 79, imposes a license tax of $200 for each county for the procuring of laborers for employment out of the State, and makes it a misdemeanor for any person, firm, or corporation to engage in such business without having paid the tax and obtained a license as required by the statute. The power of the State Legislature to impose taxes of this character, and to select and classify the occupations and trades which shall be subjected to the same, has been fully sustained in the decisions on the subject. *S. v. Lowe, ante,* 524; *Smith v. Wilkins,* 161 N. C., 135; *S. v. French,* 109 N. C., 722. The defendant has been convicted and sentenced for violation of this statutory provision, and we find no reason for disturbing the result.

It is objected for defendant that his Honor, among other things, charged the jury as follows: "Now, the charge is that the defendant was engaged in the business of procuring laborers for employment out of North Carolina, and the court charges you that if he was here, procuring one, or two, or more men to go to work in another State, he would be guilty."

If it be conceded that this excerpt, standing alone, might be the subject of criticism, on the record it may not be taken in that way, for the charge, in the very same paragraph, proceeds: "But before you can convict the defendant you must be satisfied beyond a reasonable doubt that defendant was engaged in the business of employing labor to go out of the State."

In various decisions on the subject it is held that a charge shall be considered as a whole in the same connected way in which it was given, and on the presumption that the jury did not overlook any portion of it, and, when so taken, it "fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate." *S. v. Dill,* 184 N. C., at p. 650, citing *S. v. Exum,* 138 N. C., 599, and other cases.

In this and other portions of his Honor's charge, and taking the same in an entirety, the jury were fully instructed that to constitute the offense the defendant must have been engaged in the business of pro-

curing laborers here for employment beyond the limits of the State, and they could not have been mistaken or misled by the excerpt objected to.

Defendant excepts further that his Honor charged the jury that "the burden of showing a license was on the defendant." This position, directly declared by the Court in *S. v. Morrison,* 14 N. C., 299, was reaffirmed in *S. v. Emery,* 98 N. C., 668, and has since been the unquestioned ruling with us in prosecutions of this character.

It was further and very earnestly contended for appellant that his motion for nonsuit should have been sustained for an entire lack of evidence tending to show that defendant was engaged in the business of procuring laborers for the purpose specified. It would serve no useful purpose to refer in detail to the features of the testimony as to this matter, and we consider it sufficient to say that we have carefully examined the record and are of opinion that there is ample evidence to permit the inference that defendant was engaged in the business of procuring labor for employment out of the State, and to uphold the conclusion reached by the jury.

There is nothing in the decision of *S. v. Lowe, supra,* that in any way conflicts with the disposition we make of the present appeal. In that case there was a special verdict, which established the fact that defendant was not engaged in the business of procuring labor, within the meaning of the statute, but was here to get hands for the work in which he himself was engaged, and of which he had charge. While here the jury, under a charge free from error, has found that defendant was engaged in the business of procuring labor, etc.

There is no error, and the judgment below is affirmed.

No error.

CARL THAYER, JR., BY HIS NEXT FRIEND, MAMIE G. HALL,
v. CARL THAYER.

(Filed 16 April, 1924.)

Actions—Residence—Venue—Parent and Child—Infants—Illegitimate Children—Statutes.

The residence of an unemancipated illegitimate child is, by the construction of law, that of the mother, and the venue of his action by his next friend on a contract made by his mother and father for his benefit is the county of the residence of his mother, though the child may be living with his grandparents at the time in a different county. C. S., 469.

APPEAL by plaintiff from *Shaw, J.,* at November Term, 1923, of DAVIDSON.

The plaintiff, an illegitimate son, brought suit in Davidson County against the defendant, his putative father, for support and education, under a contract alleged to have been made by the defendant and the plaintiff's mother. The defendant claimed that the plaintiff was a resident of Montgomery County, and on this ground made a motion to remove the cause, and from the clerk's denial of his motion he appealed to the Superior Court. Public Laws, Extra Session 1921, ch. 92, sec. 15. His Honor heard the evidence and found the following facts: The plaintiff lives with his grandfather in Montgomery County; he is the illegitimate child of Mamie G. Hall, and is 9 years old; his mother is a resident of Davidson County.

Upon these facts it was held as a matter of law that the plaintiff was a resident of Montgomery, and the cause was removed to this county. The plaintiff excepted and appealed.

Walser & Walser and Z. I. Walser for appellant.

ADAMS, J. An action of this character must be tried in the county in which the plaintiff or the defendant resides. C. S., 469. The defendant's residence is in Montgomery County, and if the plaintiff resides there the cause was properly removed; but if the plaintiff is a resident of Davidson County the order of removal was improvidently made.

Domicile is of three kinds—domicile of origin, domicile of choice, and domicile by operation of law. As a general rule, the domicile of every person at his birth is the domicile of the person on whom he is legally dependent, and in case of illegitimacy the domicile of origin that of the mother. A domicile of choice is a place which a person has chosen for himself, but an unemancipated infant, being *non sui juris,* cannot of his own volition select, acquire, or change his domicile. A domicile by operation of law is one which the law determines or attributes to a person, without regard to his intention or the place where he is actually living. It is consequential and usually arises out of legal domestic relations, as that of parent and child, or that of the wife, resulting from marriage.

In accordance with these principles the domicile of a legitimate child during minority, as a general rule, follows that of the father, but the domicile of an illegitimate child is ordinarily governed by that of the mother.

In *Udny v. Udny,* 9 Eng. Ruling Cases, 798, *Lord Westbury* said: "It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate." This principle has been gener-

ally adopted by the American courts and is sustained by numerous authorities. 19 C. J., 399, 410, *et seq.;* 9 R. C. L., 547; 14 Cyc., 845; 10 A. & E., 11; *Estate of Hanning,* 79 A. S. R., 43; *R. R. v. Kimbrough,* 115 Ky., 512; *Danbury v. New Haven,* 5 Conn., 584; *Sudler v. Sudler,* 49 L. R. A. (N. S.), 861, note; *Bedgood v. McLain,* 94 Ga., 283. See, also, *Reynolds v. Cotton Mills,* 177 N. C., 412; C. S., 1654; Rules 9 and 10.

Of course, there is a technical distinction between "domicile" and "residence" (*Roanoke Rapids v. Patterson,* 184 N. C., 135), but there is no suggestion that the domicile of the plaintiff's mother is in Montgomery County, and his Honor's finding shows that her residence is in the county of Davidson. Under the circumstances disclosed, the residence of the mother, in our opinion, is the residence of the plaintiff; and as the plaintiff has not been emancipated or abandoned by his mother, the mere fact that he is living with his grandfather in Montgomery County does not affect our conclusion. The order removing the cause from Davidson to Montgomery must therefore be

Reversed.

BYRD & PARKER v. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 April, 1924.)

Railroads—War—Negligence—Questions for Jury—Nonsuit—Director General of Railroads.

Where, in an action against the Director General of Railroads and a railroad company under war control, for the negligent loss *in transitu* of several of a carload shipment of mules, the Director General filed answer, admitting the receipt of the mules for transportation, and the loss *in transitu,* but denied negligence, a nonsuit as to the defendant railroad should be entered, leaving the issue as to the defendant Director General for the determination of the jury.

APPEAL by plaintiffs from *Calvert, J.,* at March Term, 1923, of DUPLIN.

The complaint alleged that Walker D. Hines was Director General of the Railroads of the United States, and that on 14 December, 1919 (now four years ago), the defendants received for transportation from Wichita, Kansas, to Wallace, N. C., 76 mules in good condition which they loaded on the cars numbered, and which arrived at Wallace 25 December, 1919, and the representative of the defendant found three mules short. The plaintiffs paid full freight and feed bill of said 76

mules from Wichita, Kansas, to destination and demanded judgment for the value of the three mules short and for excess feed and freight bill on said three mules not delivered.

The bill of lading is entitled "United States Railroad Administration—W. G. McAdoo, Director General of Railroads."

The plaintiffs assigned as error that the court erred in refusing to submit the issue tendered by them, to wit: "Were the three mules or any of them killed by the negligence of the defendant, as alleged by plaintiffs"; and in submitting the following issue: "Were the three mules, or any of them described in the complaint, delivered to the Director General of Railroads operating the A. C. L. R. R. Company?" and in directing the jury that if they believed the evidence to answer the first issue "No." Appeal by plaintiffs.

Geo. R. Ward for plaintiffs.
Stevens, Beasley & Stevens for defendants.

PER CURIAM. Walker D. Hines, styling himself Director General of Railroads (for whom subsequently Jas. C. Davis was substituted), filed his answer, admitting that he was "Director General of the Railroads of the United States," and that said 76 mules were delivered to him as such to be transported from Wichita, Kansas, to Wallace, N. C., consigned to the plaintiffs, and admits that when the cars arrived at Wallace on 25 December, 1919, that his representative checked the stock and found three mules short, but sets up a denial of negligence causing the loss of the three mules." This raised an issue of fact which should have gone to the jury, and for refusing to let them pass upon the issue there was error.

This precludes the necessity of discussing any other matters as the Director General submitted himself to the jurisdiction of the court by his answer, which admits the receipt of the mules and payment of the freight and feed therefor and the contract of carriage.

A nonsuit must be taken as to the A. C. L. R. R. Company under the ruling in *R. R. v. Ault,* 256 U. S., 557, and *R. R. v. N. Dak.,* 250 U. S., 135, which have been cited and followed in several cases in this State.

As to the Director General there must be a

New trial.

GEORGE E. MONTGOMERY AND C. A. BURKE v. L. M. LEWIS, ABE SHAPIRO AND RACHEL SHAPIRO.

(Filed 16 April, 1924.)

1. Evidence—Motions—Dismissal—Demurrer.

Upon a motion to dismiss a civil action as in case of nonsuit, the evidence is construed in the light most favorable to the plaintiff as in case of demurrer thereto.

2. Evidence—Compromise—Admissions.

While evidence of a compromise of a civil action is ordinarily rejected upon the trial, this principle is inapplicable when the party has throughout unequivocally asserted his original position, and the evidence objected to is of an admission of an independent fact, material to the inquiry.

3. Evidence—Fraud—Damages—Written Instruments—Correction—Burden of Proof—Quantum of Proof.

An action to recover damages for the fraud of the grantee in knowingly taking advantage of the plaintiff's mistake, or that of his draftsman, in including in his deed a lot of land that neither he nor his grantee had contemplated, does not require clear, cogent and convincing proof, as in instances where the instrument itself is sought to be corrected, etc., but only to satisfy the jury by the preponderance of the evidence.

STACY, J., dissenting.

APPEAL by defendant Lewis from *Lane, J.*, at November Term, 1923, of FORSYTH.

Civil action. Plaintiff took a voluntary nonsuit as to Shapiro and wife. The plaintiff Montgomery alleged that prior to 23 July, 1917, he was the owner of two lots in Winston-Salem, known as lots No. 6 and No. 7 on the property of the Ingle Land Company; that at said date he conveyed lot No. 6 to his coplaintiff Burke, who failed to register his deed; that soon afterwards he sold to the defendant Lewis lot No. 7; that lot No. 6 was embraced in the deed by the mutual mistake of Montgomery and Lewis, or by the inadvertence of the draftsman; that Lewis had wilfully and fraudulently accepted a deed including both lots, knowing that it was not the intention of Montgomery to convey lot No. 6; and that Lewis received the deed with intent to cheat and defraud the plaintiffs.

The defendants denied the material allegations in the complaint.

At the trial the plaintiffs abandoned their allegation of fraud in procuring the deed and its fraudulent alteration after delivery, together with the allegation of mutual mistake. The following issues were submitted and answered:

1. Did the defendant L. M. Lewis accept a deed to lot No. 6 described in the complaint, knowing that the description of the same was inserted by mistake, and did he receive said deed with intent to cheat and defraud the plaintiff? Answer: Yes.

2. Did he afterwards convey said lot to A. Shapiro for a valuable consideration? Answer: Yes.

3. What actual damage, if any, did the plaintiff sustain? Answer: $200.

4. What punitive damage, if any, is the plaintiff entitled to recover? Answer: None.

Judgment for the plaintiff, from which the defendant Lewis appealed.

Parrish & Deal for the appellee.

Raymond G. Parker and Moses Shapiro for the appellant.

ADAMS, J. We need cite no authority in support of the principle that a motion to dismiss an action as in case of nonsuit is treated as a demurrer to the evidence construed in the light most favorable to the plaintiff. This is elementary, and the evidence tested by this principle was sufficient to uphold the verdict. The motion to nonsuit was therefore properly overruled.

The defendant excepted to certain evidence on the ground that it embodied a rejected offer of compromise. It is true, if a person offer to compromise a demand he does not thereby necessarily admit that it is just, but if pending a compromise he make a distinct admission of an independent fact the admission may be received in evidence. *Daniel v. Wilkerson,* 35 N. C., 329; *Smith v. Love,* 64 N. C., 439; *Baynes v. Harris,* 160 N. C., 307; *Comrs. v. Scales,* 171 N. C., 523.

Upon this principle certain admissions or declarations of the defendant would have been competent even if the parties had been negotiating a compromise; but, as we understand the record, instead of trying to effect a compromise the plaintiff steadfastly insisted that the defendant should pay him the full value of the lot.

Exceptions were taken to his Honor's refusal to give certain prayers for instructions which were based upon the plaintiff's abandonment of the allegations of fraud in procuring the execution of the deed, of an alteration in the deed after it had been delivered, and of the mutual mistake of the parties, but these exceptions are not tenable. The judge definitely instructed the jury that the plaintiff relied only upon the allegations in reference to the insertion in the deed of lot No. 6 through the draftsman's mistake and the defendant's fraudulent acceptance of the deed with full knowledge of the facts; and the first issue, it will be noted, strictly conforms to these allegations.

Exceptions 12, 13, 15, 16 and 17 are addressed to instructions as to the burden of proof, the defendant contending that the alleged cause of action could be maintained only by evidence that was clear, cogent, and convincing, and not by a mere preponderance, as his Honor charged.

In civil cases the general rule is that a preponderance of the evidence is sufficient to determine the verdict, and this rule will apply in the instant case unless the allegations demanded a greater degree of proof. It will be noticed that the first issue is simple, the only question being whether the defendant with intent to deceive accepted the deed knowing that by another's mistake he was getting a lot that he had not purchased.

Our decisions recognize the principle that in an action to obtain remedial relief against the apparent force and effect of a written instrument on the ground of fraud, mutual mistake, or other similar cause, or to restore such instrument when lost, the evidence must be clear, cogent, and convincing; and in applying the principle the Court has held that this degree of proof is necessary, for example, to correct a mistake in a deed or other writing, to establish a lost deed, to convert into a mortgage a deed which is absolute on its face, to attach a parol trust to a legal estate, and to impeach the probate of a married woman's deed. *Plummer v. Baskerville,* 36 N. C., 252; *Fisher v. Carroll,* 41 N. C., 485; *Moore v. Ivey,* 43 N. C., 193; *Ely v. Early,* 94 N. C., 1; *Loftin v. Loftin,* 96 N. C., 95; *Kornegay v. Everett,* 99 N. C., 30; *Hemphill v. Hemphill, ibid.,* 436; *Pollock v. Warwick,* 104 N. C., 638; *Summers v. Moore,* 113 N. C., 394; *Nimocks v. McIntyre,* 120 N. C., 326; *Porter v. White,* 128 N. C., 42; *Benedict v. Jones,* 129 N. C., 470; *Warehouse Co. v. Ozment,* 132 N. C., 839; *Avery v. Stewart,* 136 N. C., 426; *Lehew v. Hewett,* 138 N. C., 6; *King v. Hobbs,* 139 N. C., 170; *McWhirter v. McWhirter,* 155 N. C., 145; *Cunningham v. Long,* 186 N. C., 526.

In all these cases and in others holding that clear, strong, and convincing evidence was necessary the plaintiffs sought relief against an interest or claim which might be defeated by restoring a lost instrument or against the apparent effect of an existing instrument which was the subject of litigation. In each case the purpose was to create a situation or to bring about some change that was inconsistent with the apparent effect of the writing or to show that such writing had been lost or destroyed. But when the relief demanded was that the deed should be declared void because it was procured by fraud or undue influence or because it was executed with intent to hinder, delay or defeat creditors, the decisions have held uniformly that a preponderance of evidence was sufficient to establish the material allegations. *Harding v. Long,* 103 N. C., 1, 9.

It must not be forgotten that the object of the present action is not to correct or even to set aside or modify the defendant's deed, or to obtain relief against its apparent effect. The deed remains intact; but the object is to recover the value of the lot, the retention of which by the defendant would constitute unearned benefit or "unjust enrichment."

Williston says, "The same principle of justice which requires the return of money paid under a mistake requires that other benefits received under a similar mistake should likewise be restored." Contracts, vol. 3, sec. 1575. The suit has its foundation in the doctrine of *quasi*-contracts—obligations occupying a field between contract and tort. They are imposed or created by law without regard to any agreement on the part of the party bound, because his promise is fictitious and his liability arises from implication of law, as when a person by wrongfully detaining or appropriating the property of another becomes liable to the owner for its reasonable value. 13 C. J., 244 (10); 6 R. C. L., 588 (7).

The plaintiff contended that he did not sell the defendant lot No. 6, and that the defendant, knowing the lot was inserted in the deed by mistake, accepted the conveyance with intent to deceive. Under these circumstances the plaintiff was required to establish the affirmative of the issue, as under the general rule, only by a preponderance of the evidence.

We have examined the other exceptions but they require no discussion.

We find no error in the record.

No error.

STACY, J., dissenting: I am unable to agree to the proposition that the present action is not to obtain relief against the apparent effect of plaintiff's deed. The deed, upon its face, purports to convey, and does convey, lot No. 6 as well as lot No. 7. If this represent the actual transaction between the parties, then the defendant has rightfully acquired title to both lots, and the plaintiffs have been paid for what they sold.

On the other hand, for plaintiffs to undertake to recover the value of lot No. 6 upon the theory of an "unjust enrichment," thereby affirming the deed, it is necessary for them to assert that when L. M. Lewis, their grantee, took title to said lot, he did so in trust for them; and it is the law of this State that no trust will be implied or allowed to result in favor of grantors, as against the terms of their own deed, by reason of the circumstance that no consideration was in fact paid or that the same was different from the recital contained in the deed. *Gaylord v. Gaylord,* 150 N. C., 222, and cases there cited. If *A.* make a deed to *B.* for a tract of land, with no agreement as to the purchase price, *A.* cannot recover in a suit against *B.* for its value, except upon the theory that *B.* has something which in reality belongs to *A.*, and this he may not show without an attack of some kind upon the apparent force and effect of his deed. *A.'s* right to affirm the deed and sue for damages, where the land has passed into the hands of an innocent purchaser, as it has here, is bottomed upon his initial right to impeach the deed. This is a

barrier which he must overcome before he can establish his right to damages in an action like the present.

Plaintiffs have abandoned their allegation of fraud in procuring the deed, and its fraudulent alteration after delivery, together with the allegation of mutual mistake; they rely entirely upon the allegation of mistake on their part, and fraud on the part of the defendant. Therefore, at the threshold of the case, they must show: (1) that the description of lot No. 6 was inserted by their mistake; and (2) that the defendant, with knowledge of this mistake, accepted the deed with intent to cheat and defraud the plaintiffs. The mistake of the plaintiffs, if not the fraud of the defendant, according to our decisions, must be established by clear, strong and convincing evidence. *Harding v. Long,* 103 N. C., 1; *Lamb v. Perry,* 169 N. C., p. 444.

The reason for this is, the plaintiffs are asking to be relieved, not only as against the fraud of the defendant, which, under the circumstances, would not be sufficient, but also from the consequences of their own mistake; and this must be established by evidence stronger than the deed itself. *Ely v. Early,* 94 N. C., 1. There is no allegation that the plaintiffs' mistake was induced by the fraud of the defendant.

This rule as to the *quantum* of proof makes for the preservation of titles; it was adopted in the interest of upholding their integrity, and it should not be relaxed.

STATE v. JOEL LEVY.

(Filed 16 April, 1924.)

1. Criminal Law—Homicide—Evidence—Questions for Jury—Courts—Appeal and Error.

Where the evidence is in law sufficient for the jury to convict the defendant of guilty of a homicide, the verdict accordingly rendered will not be disturbed by the courts because it was rendered upon apparently slight evidence, the weight and credibility being solely within the province of the jury.

2. Criminal Law—Jurors—Special Venire—Challenge to Array—Challenge to Polls.

The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under C. S., 2338, or drawn from the box under C. S., 2339, are both discretionary with the judge of the Superior Court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. The history of the prisoner's right of challenge to the polls, as changed by statute, with right of appeal, reviewed by STACY, J.

3. Jurors—Challenge—Poll Classification.

Peremptory challenges to individual jurors or challenges to the poll are now, generally speaking, divided into two classes, *propter defectum*, or the lack of some legal requirement, and *propter affectum*, which goes to the juror's bias or partiality of the juror, of which either party at the trial may take advantage. The principal challenges are stated by STACY, J.

4. Same—Objections and Exceptions—Appeal and Error.

Before the challenging party to the individual juror is entitled to have the adverse ruling of the trial court passed upon on appeal, it is required that he should have exhausted his peremptory challenges, and upon objection made in apt time.

5. Same—Courts—Discretion.

In the trial of capital felonies the juror must be challenged by the party when he is brought to the book to be sworn; and when it later appears that the juror is incompetent, it is discretionary with the trial judge not subject to review on appeal whether he will, under the circumstances, order a new trial.

6. Evidence—Criminal Law—Stenographer—Witnesses—Former Trial.

Where the prisoner is being again tried for a capital felony resulting from a former mistrial of the same offense, and on the second trial a witness whose testimony on her direct examination is claimed to be material to the defense cannot be procured, the testimony of the stenographer who had taken the evidence of this witness on the former trial is incompetent, upon the State's exception, when he can only give the substance of the direct examination, but not of the cross-examination, in the absence of his stenographic notes, which had been destroyed, with which to refresh his memory.

7. Criminal Law—Homicide—Evidence—Instructions.

Where there is no evidence upon the trial of a homicide for manslaughter, and the prisoner has been convicted of murder in the second degree, of which there was sufficient evidence, an exception to the charge to the jury on the ground that it restricted the jury to the consideration of the evidence of the greater offense, cannot be sustained on appeal.

APPEAL by defendant from *Stack, J.*, at November Term, 1923, of CUMBERLAND.

Criminal prosecution, tried upon an indictment charging the defendant with murder in the first degree. He was convicted of murder in the second degree, and appeals from the judgment pronounced thereon.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. L. Brothers and Dye & Clark for defendant.

STACY, J. The defendant was first tried at the March Special Term, 1923, before Judge Horton, but a mistrial was had at that term because

of the inability of the jurors to agree on a verdict. It appeared in the progress of the trial that W. C. Callahan, a deputy sheriff of Cumberland County, was shot on the morning of 24 February, 1923, and died about 4 o'clock that afternoon while in the Highsmith Hospital at Fayetteville. The deceased, about an hour before his death, fully conscious of impending dissolution, stated to his nurse, Miss Andrews, now Mrs. Wise, according to her testimony, that he knew Mr. Smith was the man who shot him. Upon the strength of this testimony Judge Horton issued a bench warrant for John Smith, and at the next term the grand jury returned a true bill against Joel Levy and John Smith, in which the two were charged jointly with the killing of W. C. Callahan.

At the August Term, 1923, Judge Sinclair presiding, the State's motion for a separate trial of the two defendants was denied, whereupon the case was continued.

At the November Term, 1923, the State took a *"nol. pros.* with leave" as to the defendant John Smith and used him on the trial as a witness against the defendant Joel Levy.

According to Smith's testimony he and another white man by the name of Toler brought 11 gallons of liquor in an automobile and put it out in the edge of a patch of woods not far from the defendant's house. After putting the liquor out, Toler drove off with his car while Smith went to notify Levy, a colored man, that the liquor was there. When Smith and Levy came back to the edge of the woods they found that the liquor had been moved, and they saw tracks leading across the sandy road from the place where it had been left. Levy insisted on following these tracks to find out what had become of the liquor. They had not gone far when they saw some one with it. Levy snatched a pistol from his pocket and fired two shots in rapid succession at the person with the liquor. This man was W. C. Callahan. Both shots took effect. Smith ran; and he and Toler came back to Fayetteville in Toler's car that afternoon. This evidence was denied in toto by the defendant, who set up an alibi and contended that he was not even present at the time of the shooting and knew nothing of it.

The testimony upon which the defendant was convicted, though positive and direct, may not be as convincing to us as it was to the jury. However, our inquiry is not directed to the weight of the evidence, but to its sufficiency to warrant a verdict. The jury alone may consider its credibility. Appreciating this fact, the defendant lodged no motion for dismissal of the action or for judgment as of nonsuit under C. S., 4643, after the State had produced its evidence and rested its case, and quite properly so.

On the trial the defendant noted several exceptions relating to the selection and impaneling of the jury, but we do not think any of them

can be sustained. The manner of summoning the special venire was likewise objected to by a challenge to the array. This is also untenable and it must be overruled. *S. v. Perry,* 44 N. C., 330; *S. v. Benton,* 19 N. C., 196 (opinion by GASTON, J.)..

The ordering of a special venire in cases where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under C. S., 2338, or drawn from the box under C. S., 2339, are both discretionary with the judge of the Superior Court. *S. v. Terry,* 173 N. C., 761; *S. v. Brogden,* 111 N. C., 656; *S. v. Smarr,* 121 N. C., 669. And unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array. *S. v. Hensley,* 94 N. C., 1021; *S. v. Parker,* 132 N. C., 1015; *S. v. Mallard,* 184 N. C., 667; *Moore v. Guano Co.,* 130 N. C., 229; *S. v. Stanton,* 118 N. C., 1182. In *S. v. Speaks,* 94 N. C., p. 873, it was said that "A challenge to the array can only be taken when there is partiality or misconduct in the sheriff, or some irregularity in making out the list." See, also, *S. v. Moore,* 120 N. C., 570.

Objections to individual jurors are made by challenges to the polls. This practice comes to us from the common law with the trial by jury itself, and has always been regarded essential to a fair determination of the issues involved. These challenges are of two kinds—peremptory and for cause.

In all capital cases, under our present practice, the prosecuting officer, on behalf of the State, is given the right to challenge peremptorily four jurors for each defendant, but he does not have the right to stand any of the jurors at the foot of the panel. C. S., 4634. The prisoner, or every person on joint or several trial for his life, is allowed to make a peremptory challenge of twelve jurors and no more. C. S., 4633.

In all other cases of a criminal nature, a peremptory challenge of two jurors is allowed in behalf of the State for each defendant; and every person on joint or several trial for an offense, other than capital, is given the right of challenging peremptorily, and without showing cause, four jurors and no more.

In all civil actions each side is allowed four peremptory challenges. C. S., 2331.

Blackstone, commenting upon this right of peremptory challenge, says in his Commentaries (4 Bl. Com., 353): "In criminal cases, or at least in capital ones, there is *in favorem vitæ* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two

reasons: (1) As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. (2) Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside"; quoted with approval in *Lewis v. U. S.*, 36 L. Ed., 1014.

At common law challenges to the polls were divided into four classes: (1) *propter respectum,* as where the juror was a lord of Parliament, when he could be challenged by either side or by himself; (2) *propter defectum,* being a lack of some qualification required by law, such as residence, age, property, etc.; (3) *propter affectum,* on account of bias, suspicion of partiality, prejudice, or the like, and (4) *propter delictum,* for criminality, as where the juror had been convicted of an infamous crime.

But with us, speaking generally, challenges to the polls are usually divided into two classes only: *propter defectum,* which is the lack of some special legal requirement, and *propter affectum,* which goes to the juror's bias or partiality. Under this latter head the challenges may be for the principal cause or to the favor. *S. v. Benton,* 19 N. C., p. 212.

The principal challenges to the polls now recognized by our practice, and of which either side may take advantage at the trial, are briefly summarized as follows:

1. If the person called for jury service be not a *bona fide* resident of the county in which the trial is being held, or from which the jury is ordered to be summoned (C. S., 473), he may be stood aside for this reason. *S. v. White,* 68 N. C., 158; *S. v. Upton,* 170 N. C., 769.

2. If he be delinquent at the time of trial in the payment of his taxes for the preceding year, he may be excused on this ground. *S. v. Sherman,* 115 N. C., 773; *S. v. Davis,* 109 N. C., 780; *S. v. Gardner,* 104 N. C., 739; *S. v. Hargrave,* 100 N. C., 484; *Sellers v. Sellers,* 98 N. C., 13; *S. v. Haywood,* 94 N. C., 847.

3. If he have a suit pending and at issue in the Superior Court of the county, he may be challenged for this cause. *S. v. Hopkins,* 154 N. C., 622; *S. v. Spivey,* 132 N. C., 989; *Hodges v. Lassiter,* 96 N. C., 351; *S. v. Vick,* 132 N. C., p. 997.

4. If he be a minor, or less than 21 years of age, he is not qualified to sit as a juror. *S. v. Griffice,* 74 N. C., 316; *S. v. Lambert,* 93 N. C., 618.

5. If he be an atheist, or deny the existence of Almighty God, he is presumed to be insensible to the obligations of an oath. *S. v. Davis,* 80 N. C., 412; *McClure v. State,* 1 Yerger (Tenn.), 206. See, also, Const., Art. VI, sec. 8, and *Shaw v. Moore,* 49 N. C., 25.

6. If he be related by blood or marriage to any of the parties within the ninth degree, he would be subject to challenge. *S. v. Potts,* 100 N. C., p. 457; *S. v. Perry,* 44 N. C., 330; *S. v. Baldwin,* 80 N. C., 390; *S. v. Ketchey,* 70 N. C., 621; *S. v. Shaw,* 25 N. C., 532.

7. If he be wanting either in intelligence or in good moral character, an objection to his competency on either one of these grounds should be sustained. This would include the *propter delictum* as known to the common law. *S. v. Peoples,* 131 N. C., 788; *S. v. Sherman,* 115 N. C., 774; *S. v. Edens,* 85 N. C., 524.

8. If he be of the same society or corporation with either party, when such society or corporation is interested in the litigation, or if he be the tenant or "within the distress" of either party, or if he have an action, implying malice, depending between himself and either party, or if he be the master, servant, counselor, steward or attorney for either party, he may be challenged upon any one or more of these grounds. Such was the rule at common law. 16 R. C. L., p. 256; *Oliphant v. R. R.,* 171 N. C., 303; *Bank v. Oil Mills,* 150 N. C., 683; *S. v. Sultan,* 142 N. C., 569; *S. v. Barber,* 113 N. C., 711; Thompson and Merriam on Juries, p. 167.

9. If he be prejudiced or biased to such an extent that he cannot render a fair and impartial verdict in the case he would be disqualified on objection to sit as a juror. *S. v. Vann,* 162 N. C., 534; *S. v. Vick,* 132 N. C., 995; *Brittain v. Allen,* 13 N. C., 120. See *S. v. Harris,* 69 W. Va., 244, as reported in 50 L. R. A. (N. S.), p. 933, where many authorities are collated and reviewed in a valuable note by the annotator.

10. In addition to the above disqualifications, or grounds for objection, if the person called be a tales juror, he would be subject to challenge if he be not a freeholder within the county, or if he has served in the same court as grand, petit or tales juror within two years next preceding such term of court. C. S., 2321. *Hale v. Whitehead,* 115 N. C., 29; *S. v. Sherman,* 115 N. C., 773; *S. v. Hargrave,* 100 N. C., 484; *S. v. Whitfield,* 92 N. C., 831; *S. v. Brittain,* 89 N. C., 481; *S. v. Whitley,* 88 N. C., 691; *S. v. Cooper,* 83 N. C., 671; *S. v. Howard,* 82 N. C., 623; *S. v. Ragland,* 75 N. C., 12.

11. The trial courts have experienced some difficulty in passing upon the qualifications of special veniremen, by reason of the apparent conflict in the following statutes:

C. S., 2326, provides: "It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served upon the jury within two years prior to the court at which the case is tried. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county of trial."

C. S., 4635, provides: "In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors."

"Persons qualified to act as jurors in said county" is the designation given to those who are to be summoned as special veniremen under C. S., 2338. And it is suggested by the Attorney-General that C. S., 4635, should be construed to apply to cases where the judge of the Superior Court exercises his discretion under C. S., 2338, and issues a special writ of *venire facias* to the sheriff of the county, commanding him to summon such number of persons qualified to act as jurors in the county as the judge may deem sufficient, leaving the express provisions of C. S., 2326, to apply to jurors drawn from the box, under C. S., 2339, and other statutes. If this interpretation be correct—and it seems to accord with well-established rules of statutory construction—it follows that special veniremen, whose names have been drawn from the box, should be considered as standing on the same footing with regular jurors, while those whose names are not drawn from the box should be considered as standing on the same footing with tales jurors. *S. v. Williams,* 185 N. C., p. 664. It may be well to note that the present statutes, relating to the subject in hand, are slightly different from what they were when the following cases were decided: *S. v. Carland,* 90 N. C., 668; *S. v. Whitfield,* 92 N. C., 831; *S. v. Kilgore,* 93 N. C., 533; *S. v. Starnes,* 94 N. C., 973; *S. v. Powell,* 94 N. C., 965; *S. v. Cody,* 119 N. C., 908.

It should be observed that no ruling relating to the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror. *Oliphant v. R. R.,* 171 N. C., 303. His right is not to select but to reject jurors; and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more upon a new trial, and this he has already had on the first trial. *S. v. Sultan,* 142 N. C., 569; *S. v. English,* 164 N. C., 497;

S. v. Bohanon, 142 N. C., 695; *Sutton v. Fox,* 55 Wis., 531. Hence the ruling, even if erroneous, would be harmless. *S. v. Cockman,* 60 N. C., 485.

Challenges to the polls, or objections to individual jurors, must be made in apt time, or else they are deemed to be waived. It is too late after the trial has been concluded. In capital cases a challenge *propter defectum* or *propter affectum* should be made as the juror is brought to the book to be sworn and before he is sworn. *S. v. Davis,* 80 N. C., 412. The fact that an incompetent juror was permitted to sit on the case does not vitiate the verdict. *S. v. Upton,* 170 N. C., p. 771. But when the incompetency is not discovered until after the verdict, it is then discretionary with the judge presiding as to whether he will, under the circumstances, order a new trial, and his action in this respect is final. *S. v. Lambert,* 93 N. C., 618.

The defendant's chief assignment of error, or the one most strongly urged on the argument and in his brief, is the exception addressed to the ruling of the court in excluding the testimony of Mrs. Wise, *nee* Miss Andrews, the nurse, to the effect that the deceased, about an hour before his death, when fully conscious of impending dissolution, stated to her that he knew Mr. Smith was the man who shot him. This evidence was given at the first trial and taken down by the court stenographer, and the witness duly cross-examined in regard to the dying declaration of the deceased. At the time of the second trial, Mrs. Wise was out of the State and she could not be obtained as a witness. The transcript of her testimony, given on the former trial, did not show the cross-examination. The stenographer who took the evidence of the witness "stated that part of his notes had been destroyed by rats or lost; that he could testify as to what she said on her direct examination, but did not feel that he could testify to the substance of the cross-examination, and he didn't think that he could find a sufficient amount of his notes from which he could obtain the cross-examination of the absent witness." Upon objection by the State to the introduction of only the direct examination of the absent witness, and without having present in court her cross-examination, the evidence was excluded. This ruling is in accord with the authorities on the subject. *S. v. Maynard,* 184 N. C., 653; *Boney v. Boney,* 161 N. C., 621; 8 R. C. L., 217. Though in Pennsylvania it appears that the absence of the cross-examination is not always held to be fatal to the admission of such evidence. "The notes of counsel, showing what a deceased witness testified to on a former trial between the same parties, touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel did not recollect the testimony independent of his notes, and although he did not recollect the cross-examination." *Lewis, C. J.,* in *Rhine v.*

Robinson, 3 Casey, 30; followed and quoted with approval in *Phila. and Reading R. R. v. Spearen,* 11 Wright, 306, and *Brown v. Commonwealth,* 73 Penn. St., 321.

But the better rule, according to the weight of modern authority, is to the effect that unless the witness be able to give in substance the whole of what was said on the former trial by the absent or deceased witness, or at least the whole of what was said concerning the particular subject of inquiry, including the cross-examination as well as the direct examination, such testimony may not be received in evidence. 10 R. C. L., 971. See exhaustive opinion of *Drummond, J.,* in *U. S. v. Macomb,* 5 McLean's Reports, 286.

The question is not presented on the present record as to whether this evidence would have been competent under the doctrine announced in *S. v. Lane,* 166 N. C., 333, even if the witness could have stated in substance the whole of what was said by the absent witness on the former trial.

Defendant earnestly insists that if he could have had the benefit of this evidence in connection with his own testimony tending to establish an alibi, a different verdict would have been rendered. Possibly so, but our inquiry is limited to errors of law, and we have found none on the instant record.

The defendant also excepts because the court in its instructions excluded from the jury any and all consideration of the charge of manslaughter, and restricted their deliberations to the questions of murder in the first and second degrees and acquittal. In this there was no error. The record discloses no evidence upon which a verdict of manslaughter could have been rendered. *S. v. White,* 138 N. C., 722; *S. v. Johnson,* 161 N. C., 264. In this respect the case is unlike *S. v. Merrick,* 171 N. C., 788, so strongly relied upon by the defendant.

The remaining exceptions present no new or novel point of law. The record is free from any prejudicial or reversible error in law.

No error.

A. S. JONES v. CHRISTIAN JONES.

(Filed 16 April, 1924.)

1. Pleadings—Statutes—Presumptions.

Under the provisions of chapter 92, section 1, subsections 2 and 3, Public Laws, Extra Session of 1921, it will be presumed on appeal that the complaint in a civil action was filed on or before the return day of the summons, nothing else appearing, according to the time thereof therein specified.

2. Same—Defendant's Bond to Retain Possession of Lands.

When the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the land, the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, C. S., 495, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. Chapter 93, section 1, subsections 2, 3, Public Laws, Extra Session 1921.

3. Same—Receivers—Remedy at Law.

In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continued possession, C. S., 495, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, C. S., 860, sec. 1, is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him.

4. Same—Appeal and Error.

Held, upon the record in this appeal, involving only the plaintiff's right to the appointment of a receiver for the defendant, the question of the sufficiency of the allegations of the complaint to state facts sufficient to constitute a cause of action to set aside defendant's deed to the lands in controversy does not arise.

THIS was an application for the appointment of a receiver, heard before *Lane, J.*, at chambers, FORSYTH. Appeal by defendant.

John C. Wallace and Graves, Brock & Graves for plaintiff.
Parrish & Deal for defendant.

CLARKSON, J. The record shows that summons was duly issued out of the Superior Court of Forsyth County on 30 July, 1923, by plaintiff against defendant, returnable 14 August, 1923, and the summons was duly served on the defendant. It is presumed the complaint was filed in the clerk's office on or before the return day of the summons, 14 August.

The defendant had 20 days in which to answer or demur after the return day, 14 August.

Public Laws, Extra Session 1921, ch. 92, sec. 1, subsecs. 2 and 3, are as follows:

"Subsection 2. The complaint shall be filed on or before the return day of the summons: *Provided,* for good cause shown the clerk may extend the time to a day certain.

"Subsection 3. The answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint upon each

of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing complaint, then the defendant shall have twenty days after the final day fixed for such extension in which to file the answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond twenty days after such service): *Provided,* in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain."

The complaint seems to be in the nature of an action to recover real property and the rents and profits and to set aside a deed.

C. S., 495, is as follows: "In all actions for the recovery or possession of real property the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the Superior Court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars; to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits."

Before the time to plead expired, defendant, on 22 August, 1923, filed a bond in due form, in the sum of $750, with A. B. Brewer as surety, for costs, damages and rents and profits, in accordance with the above statute. The bond was a justified one and approved by the clerk of the Superior Court of Forsyth County. The defendant had 20 days after 14 August—return day of summons—before he pleaded, in which to file the bond, which was done and within the time. Defendant pleaded by filing a demurrer to the complaint on the ground "that the plaintiff has declared on inconsistent causes of action." The complaint was amended, or modified, and answer filed by defendant. The bond before the clerk was filed without any order of court. Plaintiff applied before the judge of the court below for a receiver, which was granted, and from the judgment appointing a receiver, defendant appealed.

We think from the nature of the action, as we construe the allegations in the complaint, that the defendant pursued the legal course by filing the bond under C. S., 495. (See *Battle v. Mercer, ante,* 447.) We infer that the action is to recover real property, the rents and profits, and set aside a deed. Whether this can be done under the allegations in the complaint and the terms of the deed we do not now pass upon. The matter passed on here only relates to the receivership, but, as to the language in the deed asked to be set aside, we call attention to *Fleming v. Motz, post,* 593.

It was not necessary for defendant to get an order of court or authority from the court to file the bond from the view we take of the case. The statute makes provision and it is a matter of right. If the bond given for costs, damages, rents and profits, under C. S., 495, *supra,* which was approved by the clerk, is not sufficient, upon proper proofs, the case being now in the Superior Court, at term, for trial upon the issue, the court below would have discretion to increase the bond. The defendant as a matter of right filed the bond under section 495, and did so in due time. The statute was passed to protect the rights of plaintiff by requiring defendant to give bond in cases of this nature, as we construe the complaint.

C. S., 860, sec. 1, is as follows: "Before judgment, on the application of either party, when he establishes apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired, except in cases where judgment upon failure to answer may be had on application to the court," etc., a receiver may be appointed.

The language of the statute is "When he establishes apparent right to property," etc.

There is no allegation that the defendant is insolvent. It is alleged that "plaintiff will suffer irreparable injury," but the facts all show that any injury that may be suffered can be measured by compensation in money.

The appointment of a receiver is equitable in its nature and based on the idea that there is no adequate remedy at law, and is intended to prevent injury to the thing in controversy; the power is inherent in courts possessed of equitable jurisdiction. The right must be clearly shown, and there is no other remedy that is safe or expedient.

High on Receivers (3 ed.), sec. 8, says, in part: "The appointment of a receiver *pendente lite,* like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case. And where the court is unable to see any benefit will result from appointing a receiver in the cause, or that any injury will follow from refusing the relief, it will not interfere, especially if it is apparent that great confusion and difficulty in the management of the property may result to both parties from a receivership. So if, upon a consideration of all the circumstances of the case, it is apparent that greater injury will ensue from appointing a receiver than from leaving the property in its present possession, or if other considerations of propriety or of convenience render the appointment improper or inexpedient, the court will refuse

to interfere." *Hanna v. Hanna,* 89 N. C., 68; *Thompson v. Pope,* 183 N. C., 124; *Tobacco Assn. v. Bland, ante,* 361.

On the uncontroverted facts of the entire record we think, under the facts and circumstances of this case, that as the statute allows bond to be given in a case of this nature, as we now construe the allegations of the complaint, and the bond having been given, that the appointment of a receiver is unnecessary, as the bond protects the rights of plaintiff until the matter is adjudicated. The entire record shows an unfortunate family difference. We think the ends of justice will be met by dissolving the receivership appointed in the cause, which, under the circumstances, would naturally entail expense to litigants, both living in the same home and carrying on farming operations. The bond filed on 22 August, 1923, by defendant, with A. B. Brewer as surety, for costs, damages and loss of rents and profits, shall be and continue operative and binding on the defendant and his surety, according to its tenor.

For the reasons given, the judgment below is

Modified and affirmed.

JOHN M. FLEMING ET AL. v. A. H. MOTZ.

(Filed 16 April, 1924.)

1. Wills—Devise—Power of Sale—Deeds and Conveyances—Title.

A devise of the testatrix of her home to her three sons, who survived her as her only heirs at law, upon condition that it be kept as a home for all, except in the event they fully consented to sell it, and upon the death of one of them his share to revert to the living ones for an equal division: *Held,* the controlling intent of the testatrix was not to make an absolute restraint on alienation, or to continue the home until the death of the last survivor, but that upon the death of one the house could be sold and conveyed with the consent of the surviving sons.

2. Deeds and Conveyances—Consideration—Support of Grantor—Covenants—Charge Upon Land—Subsequent Grantees—Notice.

A conveyance of land upon consideration of the grantee maintaining the grantor for life is a covenant charging the land therewith, and is binding not only on the grantee, but as a charge upon his successors in title who take by deed with actual or constructive notice thereof.

APPEAL by defendant from *Lyon, J.,* at the Special November Term, 1923, of CASWELL.

Mrs. Jasper Fleming died in 1918 leaving a will, the ninth item of which is as follows: "I desire the home to be kept as a home for all, unless it is thought best to sell, and then with the full consent of my three sons. If either son dies I do not want the home sold but let their

share revert to the living ones. But if by mutual consent of my three sons a sale is made it shall be equally divided between the three sons." The three sons who survived the testatrix were John M. Fleming, Robert Fleming, and Paul Fleming, her only children and heirs at law. On 4 February, 1921, Robert died leaving a widow and two children, namely, Mrs. Nannie Hunt Fleming (widow), John M. Fleming, Jr., and Mrs. Evelyn Callen, wife of Paul Callen, as his only heirs. John M. Fleming, Jr., is a minor under twenty years of age, without general or testamentary guardian, and is represented in this cause by his next friend. After the death of Robert Fleming, to wit, on 27 April, 1921, John M. Fleming and Paul Fleming and his wife conveyed a one-third undivided interest in the devised land to Mrs. Nannie Hunt Fleming, widow of Robert Fleming, and on 14 June, 1921, Mrs. Fleming conveyed said one-third undivided interest to Paul Callen, her son-in-law, in consideration of $100 and maintenance during her natural life. This deed was registered 2 August, 1921. On 22 August, 1921, Paul Callen and his wife conveyed said interest to John M. Fleming, Sr. On 12 October, 1923, John M. Fleming, Sr., and Paul Fleming offered the entire property for sale by public auction, and the defendant became the last and highest bidder at $6,000, which was acceptable to John M. Fleming, Sr., and Paul Fleming. Since said sale John M. Fleming, Sr., Paul Fleming and wife, and John M. Fleming, Jr., have executed and tendered a deed for said property to the defendant, and he has declined to accept it on the ground that a good and indefeasible title cannot be conveyed by said parties. The trial judge held that they could convey a good and indefeasible title, and the defendant excepted and appealed.

P. W. Glidewell for plaintiff.
E. F. Upchurch for defendant.

ADAMS, J. The defendant requests our consideration of only two exceptions. The first involves a determination of the question whether by the ninth item of the will the testatrix intended to preserve the devised property as a home for her three sons so long as any one of them lived; and if this question be resolved against the defendant, it seems to be conceded that the devisees acquired the fee as tenants in common, subject to the contingency of a reversion to the "living ones if either son died." *Southerland v. Cox,* 14 N. C., 394; *Rowland v. Rowland,* 93 N. C., 214, 221.

The devise was not intended as an absolute restraint on alienation. If either son died his share was to "revert" to the survivors, and a sale was to be made by the mutual consent of the three sons if living,

or evidently by the two surviving if one died before the conveyance was executed. We therefore do not concur in the suggestion that it was the purpose of the testatrix to keep the place as "a home for all" until the death of the last survivor.

About three months after Robert's death his surviving brothers conveyed to his widow, Mrs. Nannie Hunt Fleming, a one-third undivided interest in the home, and on 14 June, 1921, Mrs. Fleming conveyed her interest to Paul Callen in consideration of one hundred dollars and maintenance during her natural life. The defendant contends that the consideration of maintenance creates a charge upon the interest conveyed by her, and that subsequent purchasers took Callen's title *cum onere.*

In *Bailey v. Bailey,* 172 N. C., 671, 674, the grantor conveyed certain tracts of land "in consideration of $791, and my maintenance during my natural life"—almost the identical language employed in the deed before us. The court, noting the distinction running through several of our decisions, held that the consideration created a charge upon the land, and said: "The meaning and effect of a provision for maintenance, frequently found in deeds and wills, have received different constructions, depending on the placing of the provision and upon other terms of the instrument in which it appears. In some of the cases it is dealt with as a personal covenant (*Taylor v. Lanier,* 7 N. C., 98; *Ricks v. Pope,* 129 N. C., 55; *Perdue v. Perdue,* 124 N. C., 163; *Lumber Co. v. Lumber Co.,* 153 N. C., 50), in others as constituting a charge on the rents and profits from the lands (*Gray v. West,* 93 N. C., 442; *Wall v. Wall,* 126 N. C., 408), and in others as a charge on the land itself (*Laxton v. Tilly,* 66 N. C., 327; *Helms v. Helms,* 135 N. C., 171)."

In *Laxton v. Tilly* and in *Helms v. Helms* the consideration was similar to that mentioned in the deed to Paul Callen, and in the latter case *Mr. Justice Connor* said that the wording of the deed did not constitute a condition subsequent, a breach of which entitled the grantor to avoid the deed, but operated rather as a covenant to furnish support, a breach of which constituted a charge upon the land. See, also, the same case on a rehearing reported in 137 N. C., 207.

According to these authorities the provision for maintenance incorporated in the deed executed by Mrs. Fleming constitutes a charge upon the interest therein described and is enforceable not only against her immediate vendee, but against the subsequent purchasers who acquired their title with actual or constructive notice of the charge. *Outland v. Outland,* 118 N. C., 139; *Wall v. Wall, supra.*

For this reason the judgment of his Honor is

Reversed.

W. H. POWELL, ADMINISTRATOR, v. ASSURANCE SOCIETY.

(Filed 16 April, 1924.)

1. Removal of Causes—Waiver—Courts—Jurisdiction.

The right of defendant to remove a cause from the State to the Federal Court under the provisions of the Federal Removal Act, is not jurisdictional, and may be waived by his failure to assert his right as the statute requires and in apt time.

2. Same—Pleadings—Rules of Court—Statutes.

The Federal Removal Act, requiring that the defendant having this right file his petition and bond for removal before time for answer, etc., has expired, as fixed by the State law, or by the rule of the courts of the State in which such suit has been instituted and is pending, applies only to such rule having a general fixed and uniform relation to all cases coming within its provision, and not to an order allowing an extension of time to plead in the particular case.

3. Same—Terms of Court—Orders—Presumptions.

The provisions of the Consolidated Statutes requiring that pleadings in civil actions be filed in the Superior Court during term, under certain regulations, with the presumption that all the parties were actually or constructively before the Superior Court during term, have been changed by express provision of the recent statute giving the jurisdiction to the clerk of the court, the defendant being given twenty days after the final day fixed for the time to answer, when the complaint has not been served with the summons; and the defendant desiring to remove the cause from the State to the Federal Court under the Federal statute, may within that time file his proper petition and bond in the State court wherein the action had been brought, if done before he has filed his answer, or demurred, and his failure to object to an order allowing the plaintiff further time for the filing of the complaint is not now a waiver of his right. Public Laws, Extra Session of 1921, sec. 1, subsecs. 2 and 3.

APPEAL by plaintiff from *Calvert, J.*, at March Term, 1924, of COLUMBUS.

Civil action heard on motion to remove cause to the Federal Court, and on appeal from the clerk of the Superior Court.

The action is to recover the amount of two policies of insurance against defendant company, a New York corporation. Summons issued in Columbus County, returnable before the clerk of the Superior Court of Columbus County on 3 January, 1924. On return day, defendant not being present, an order was entered allowing plaintiff till 23 January, 1924, to file complaint. On 23 January complaint was filed. On 25 January defendant appeared before clerk, pursuant to notice issued and served on plaintiff and on affidavit filed showing diversity of citizenship, and, tendering a proper bond, asked that the cause be removed to the Federal Court for the Eastern District. The motion was denied,

and said clerk also refused to furnish a certified copy of record for the purpose of filing same in the Federal Court, the proper fees therefor having been duly tendered.

On appeal, the case was heard in term before his Honor, Calvert, J., who reversed the ruling of the clerk and directed that the cause be removed and record certified as prayed. Plaintiff excepted and appealed.

L. R. Varser, H. E. Stacy, and Dickson McLean for plaintiff.
E. K. Bryan and S. Brown Shepherd for defendant.

HOKE, J. The Federal statute applicable, Federal Judicial Code, sec. 29, requires in effect that a motion by defendant to remove a cause to the Federal Court shall be made at or before the time for answering expires as fixed by the laws of the State, or by rule of the State courts in which such suit is instituted and pending. This term, "rule of court," has been held to mean a standing rule, making fixed regulation as to the time to file pleadings, and applying to all cases coming under its provisions, and, the right of removal not being jurisdictional, it is further held that the same may be waived, and will be considered waived when there has been a special order extending the time to plead beyond the statutory period, without exception filed or other protest made by the party entitled. *Dills v. Fiber Co.*, 175 N. C., 49; *Patterson v. Lumber Co.*, 175 N. C., 90; *Hyder v. R. R.*, 167 N. C., 584; *Bryson v. R. R.*, 141 N. C., 594; *Howard v. R. R.*, 122 N. C., 944; Moore on Removal of Causes, sec. 156.

Speaking to the questions presented in *Dills v. Fiber Co., supra,* it was said: "This term, 'rule of court,' appearing in the statute, has reference to a standing rule having the force of law (*Mecke v. Mineral Co.*, 122 N. C., 790-797; *Fox v. R. R.*, 80 Fed., 945), and the decisions in this State interpreting the statute are to the effect that where the time to file pleadings has been extended on the application of the parties, or when such time is given at some particular term by special order of court, and same is not objected to, such order is taken to have been acquiesced in by defendant, and the right of removal is thereby waived."

At the time that decision was made, and in the case there presented, the pleadings were made up in term, when both parties were actually or presumably present, and the time allowed to answer was during the term to which the summons was returnable. Since that time, however, the statute has been amended, requiring that pleadings primarily be filed before the clerk; the provision especially pertinent being section 1, subsections 2 and 3, Laws 1921, Extra Session, chapter 92:

"Subsec. 2. The complaint shall be filed on or before the return day of the summons: *Provided,* for good cause shown, the clerk may extend the time to a day certain.

"Subsec. 3. The answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint upon each of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing complaint, then the defendant shall have twenty days after the final day fixed for such extension in which to file the answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond twenty days after such service): *Provided,* in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain."

In the present case plaintiff was allowed till 25 January, 1924, to file his complaint. There is now no requirement or presumption that a defendant should be present during the entire statutory period for filing pleadings, and the statute making express provision "that if the time is extended for filing the complaint, the defendant shall have twenty days after the final day fixed for such extension in which to file answer or demurrer," the application of defendant on January 25 instant is well within the time as fixed by the statute, and his Honor has correctly ruled that the same is in apt time and that the cause be removed, and as prayed for.

Judgment affirmed.

WILSON GREENE ET AL. v. MRS. SALLIE GREENE LYLES ET AL.

(Filed 16 April, 1924.)

Appeal and Error—Rehearing—Briefs—Rule of Court—Waiver—Judgments.

A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief according to Rule 28, and he has not appealed from the judgment.

PETITION by appellees to rehear this case, decided 19 March, 1924, and reported *ante,* 422.

William H. & Thomas Ruffin for petitioners.
B. L. Fentress and Roberson, Jerome & Haworth for appellants.

STACY, J. The petition to rehear was submitted to the Court in conference by the Justices to whom it was referred. *Cooper v. Comrs.,* 184 N. C., 615.

The petition is not based on any allegation of error in the opinion as filed, but upon the ground that exception No. 2, noted on the record, was not considered or dealt with in the opinion of the Court. This exception was to that portion of the judgment directing a sale of the land through a commissioner. See *Tayloe v. Carrow,* 156 N. C., 6, and *Ledbetter v. Pinner,* 120 N. C., 455.

The exception was not mentioned in the opinion because it was not brought forward in appellant's brief, and was therefore abandoned by her. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28, 185 N. C., p. 798. The appeal presented no objection to that portion of the judgment directing a sale of the land.

But in no event would the appellees be entitled to have this exception considered by filing a petition to rehear. They did not appeal from the judgment, and the appellant abandoned the exception relating to the order of sale. Error having been found in the judgment below, the case goes back for judgment in accordance with the opinion as certified to the Superior Court.

The petition must be denied.

W. H. MATTHEWS v. B. H. GRIFFIN.

(Filed 23 April, 1924.)

Wills—Power of Sale—Deeds and Conveyances—Intent—Evidence.

In order to make a valid conveyance of land devised with the power to sell without application to court, it is not now required that the devisee expressly refer thereto in her conveyance, if it is properly made to appear from the perusal of the entire deed that it was made in the exercise of the power conferred on her, or it can thus plainly be inferred therefrom, and pertinent matters *in pais* can also be resorted to in aid of this interpretation; and *Held,* further, the later deed of the devisee purporting to cure the supposed defect in the execution of the power by her former one would operate as an estoppel inuring to the grantee and those claiming title under him.

CONTROVERSY without action heard on case agreed before *Grady, J.,* at March Term, 1924, of WAKE, the controversy presented being that plaintiff, having conveyed in fee simple a parcel of land or lot in the city of Raleigh, and executed by deed with full covenants, seeks to recover on an installment note past due, and being part of purchase price for said lot. Defendant has refused to pay on the ground that

plaintiff's deed has conveyed no title, and there has been a breach of the covenants in plaintiff's deed of conveyance, defendant, however, admitting the obligation and his desire and intent to comply therewith, provided that plaintiff's deed conveys a good title to the lot. The court being of opinion that the title offered was a good one, there was judgment for plaintiff, and defendant excepted and appealed.

B. L. Fentress for plaintiff.
J. Crawford Biggs for defendant.

HOKE, J. From the facts properly presented it appears that the lot in question, specifically described in the formal statement, was formerly owned by Mrs. Bertha F. Rosenthal, who died in 1919, having made disposition of the same in her last will and testament, the portions of which directly pertinent to this controversy, being items 7 and 8 of said will, in terms as follows:

"Item 7. The rest and residue of my estate, consisting of real and personal property, money and securities, I give, devise and bequeath to my beloved husband, Gustave Rosenthal, and my daughter, Bertha Rosenthal, or the survivor of them, during their lives, or so long as the latter may remain unmarried. In case she marries she is to receive an equal amount of money with her sisters, and my husband, if living, shall remain in possession of the property described in this item during his life. If, however, she survives my husband and is unmarried at the time of his death, she is to remain in possession of said property, as provided hereinbefore, and after death, it is to be equally divided among my other children. In case of death of any of them, their child or children shall take their mother's place.

"Item 8. My husband and daughter Bertha, or the survivor of them, shall have power to sell any or all of the real estate or personal property herein mentioned without application to the courts, and invest the proceeds in good, interest-bearing securities."

That the husband, Gustave Rosenthal, died before the testatrix, and the daughter, Bertha Rosenthal, the other devisee named in items 7 and 8, survives the said husband and was unmarried at the time of his death. That the testatrix left her surviving, in addition to said Bertha, three other daughters, two of whom are married and have children, and these three daughters have conveyed by proper deeds all their interest in the property in controversy to their sister Bertha, the life tenant.

That on 5 November, 1919, Bertha Rosenthal, the devisee and life tenant, by proper deed, and for a consideration to the full value of the entire ownership, conveyed the lot to L. G. Richardson in fee simple

and by deed with full covenants. And thereafter said Richardson sold for full value and conveyed to W. H. Matthews, vendor of defendant, the said property, executing a deed therefor in fee with full covenants, etc. That said Matthews, on 29 December, 1922, sold said land to N. G. Carroll and B. H. Griffin, and conveyed same to said vendees by proper deed, and said B. H. Griffin, having acquired Carroll's interest by proper deed, has assumed the obligation for the purchase price, and admits owing the purchase-money note presently due, provided a good title to the property can be made.

It further appears that on 23 November, 1923, Miss Bertha Rosenthal, the life tenant and devisee under items 7 and 8 of the will, executed a full and formal deed to W. H. Matthews, vendor of defendant, conveying the property in fee and making full and formal recital and reference to the powers contained in the will, stating that her original deed was intended to be in proper execution of her powers under the will, the same having been for reinvestment, and that the full title for the fee-simple value for the property had been received, etc.

Upon these, the pertinent and controlling facts in the controversy, we must approve his Honor's ruling that there is no defect in the title as conveyed, and defendant must comply with his contract.

Under item 7 of the will it would seem that the ascertainment of those who are to take in remainder after the life estate of Miss Bertha Rosenthal is postponed till the death of the life tenant, thereby constituting a contingent remainder under the principles approved in *Thompson v. Humphrey,* 179 N. C., 44; *Latham v. Lumber Co.,* 139 N. C., 9, and other cases.

If this be the correct construction, the deeds of the other children of the testatrix would not operate to give full assurance of the title, for the contingency being due to the uncertainty of the person who is to take in remainder, if one of these children should die pending the life estate, leaving children, these, the grandchildren, would take directly from the testatrix, and the conveyance of the parent would be of no avail. Without definite decision of this question, however, because not necessary to a disposition of the case, we are of opinion that the title conveyed by the grantor, Matthews, is a perfect title under the deeds of Miss Bertha Rosenthal, the life tenant, with power under the will to convey in fee.

While some of the earlier decisions were more strict in their requirements that in order to the validity of instruments executed by persons having a power of appointment, express reference to the power should be made, a more liberal rule prevails in the later and authoritative cases on the subject, and it is now very generally accepted that the question is largely one of intent, and the instrument will be upheld as a valid

execution of the power where, on its entire perusal, the intent to exercise the power can be plainly inferred, and that pertinent facts *in pais* may be resorted to in aid of such interpretation. *Kirkman v. Wadsworth,* 137 N. C., 453; *Taylor v. Eatman,* 92 N. C., 601; *Lee v. Simpson,* 134 U. S., 572; citing, among other cases, *Blagge v. Miles,* 1st Story, 426; *Warner et al. v. Connecticut Mutual Life Insurance Co.,* 109 U. S., 357; *Blake v. Hawkins,* 98 U. S., 315; *Crane v. Morris,* 6 Peters, 598; *South v. South,* 91 Indiana, 221; *Willier v. Cummings,* 91 Neb., 571, reported also in Anno. Cases, 1913 D, 287; *Brown v. Nelms,* 86 Arkansas, 368; 21 R. C. L., pp. 795-798.

In the well-considered editorial note on this subject appearing in Annotated Cases, 1913 D, *supra,* and as more directly apposite to the question presented here, it is said: "While the rule is, that where one has both an estate in and a power over property, and does an act which may be referred either to the execution of the power or to the exercise of his rights as owner, it will be presumed that the act is done by reason of his ownership; still if a conveyance is made which cannot have full effect except by referring it to an execution of the power, though some estate would pass by reason of the ownership, the conveyance will be referred to the power"; citing numerous cases, and quoting from our own decision of *Kirkman v. Wadsworth,* as follows: "If a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass although the power is not referred to in the deed. If the donee of the power has an estate in the property outside and independent of the instrument creating the power, or any separate estate in the property, however created, and makes a deed the terms of which will be fully satisfied by such independent estate, which deed contains no reference whatever to the power, his conveyance will be referred to his own independent estate, and it will be presumed that the donee intended to convey his independent estate only, and that he did not intend the deed as an exercise of the power of appointment under a trust."

Under a correct application of these principles, it appearing that Miss Bertha Rosenthal having a life estate in the property under her mother's will, with a power to sell and convey the fee, has made a sale of the same and executed a deed to the purchaser conveying a fee-simple title with full covenants, and has received therefor as the purchase price the full value for the entire interest so conveyed, this instrument should be upheld as a valid exercise of the power conferred upon her by the will, and her vendee, Richardson, having conveyed said lot by proper deeds to Matthews, who in turn has conveyed to defendant, the latter, as stated, has thereby acquired and holds a good title.

And if it were otherwise, the later deed made by Miss Rosenthal to Matthews in 1923, making full recital of her power and her intent to exercise same, would give further and full assurance of title if any were needed. The operation of such deed by way of estoppel inuring to the benefit of defendant as grantee of Matthews under the covenants contained in such deed. *Door Co. v. Joyner,* 182 N. C., 520, citing *Hallyburton v. Slagle,* 132 N. C., 947; *Wellborn v. Finley,* 52 N. C., 228-237, and other cases.

There is no error, and the judgment of the lower court is

Affirmed.

S. G. GARNER v. J. G. QUAKENBUSH, W. W. GARRETT AND M. W. McPHERSON.

(Filed 23 April, 1924.)

1. Judgments—Pleadings—Default—Motion to Set Aside—Claim and Delivery—Replevin—Principal and Surety.

A judgment by default for the want of an answer wherein the defendant has replevined personal property in claim and delivery, and cannot restore it, and has since been adjudged a bankrupt, will not be set aside for excusable neglect for the failure of an attorney employed by the defendant to file the answer, or upon the ground that if the property had been returned by defendant it would have been subject to liens superior to the claim of the plaintiff.

2. Bankruptcy—Liens—Priorities—Mortgages.

Proceedings in bankruptcy can only affect judgment liens acquired within the four months prior period, and not the lien of a valid mortgage included in the judgment subsisting theretofore.

3. Judgments—Pleadings—Default—Motions to Set Aside—Excusable Neglect—Meritorious Defense.

Upon motion to set aside a judgment by default final for the want of an answer upon the ground that it should have been by default and inquiry, the movant must show a *prima facie* case entitling him to this relief, or that a different result would probably follow.

4. Same—Bankruptcy—Mortgages—Liens—Claim and Delivery—Replevin—Principal and Surety.

As against the trustee in bankruptcy of a mortgagor of personal property, replevined in claim and delivery by the mortgagor, the surety on replevin bond may show by his evidence on his motion to set aside a judgment by default final for the want of an answer, that the judgment should have been by default and inquiry, upon the ground that the property replevined was insufficient in value to pay off the judgment in the mortgagee's favor. *Semble,* the question as to what extent the judgment should otherwise share in the bankrupt's estate is within the jurisdiction of the bankrupt court.

GARNER *v.* QUAKENBUSH.

APPEAL by defendants from *Stack, J.,* at October Term, 1923, of MOORE.

This was a motion to set aside a judgment which had been rendered by default final for want of an answer alleging irregularity in its rendition, and also excusable neglect.

The action was upon a note for $400, dated 10 November, 1921, with claim and delivery proceedings for the possession of four mules and two horses mortgaged to secure the payment of the note. The stock was seized by the sheriff, and the defendant Quakenbush, with Garrett as surety, gave the usual replevin bond to secure its return. Judgment was taken by default final against both Quakenbush and Garrett, his surety, before the clerk on 25 February, 1922, and some months later, after the judgment had been docketed in Alamance and execution sent to the sheriff of that county, motion was made on 15 July, 1922, to set aside the judgment, and on 5 August, 1922, a similar motion was made by M. W. McPherson, trustee of Quakenbush, who had been declared a bankrupt on 20 May, 1922. These motions were denied by the clerk, and on appeal, Stack, J., affirmed his judgment, finding as facts that the summons on this action issued on 21 December had been personally served on the defendant Quakenbush on 24 December, 1921, and that on 27 December, under the claim and delivery proceedings, which had been instituted simultaneously with the issuance of the summons, the sheriff seized the four mules and two horses, which were in the possession of defendant Quakenbush, and he executed the replevin bond in the usual form, with Garrett as surety, whereupon the said personal property was redelivered to Quakenbush. There was no request on the part of the plaintiff to enlarge the time for filing the complaint, which was filed on 4 February, 1922. The defendant Quakenbush did not move to dismiss said action on account of the failure to file complaint, and on 25 February, 1922, the clerk rendered the judgment set out in the record proper in favor of the plaintiff and against Quakenbush and Garrett, his surety on the replevin bond. On 24 March, 1922, the clerk issued execution against Quakenbush and Garrett, his surety, to Alamance County where they resided; none of the mules and horses were returned to the plaintiff and no part of the said judgment has been collected, and the horses and mules are not now in the possession of either defendant, and cannot now be found.

The court further found as a fact that when the action was instituted the defendant consulted a regular practicing attorney, resident in Alamance, and employed him to represent him in the case, but said attorney failed to file an answer. The defendants offered to show as a defense to plaintiff's action that if the sheriff redelivered the mules and horses to the defendant they would have been sold by other creditors holding

liens on them prior to the plaintiff's, but the court did not hold this to be a meritorious defense, and excluded such evidence.

The plaintiff moved the court to hear evidence as to the value of the mules and horses taken in the claim and delivery, and the court finds from the testimony that the personal property released upon the replevin bond was to the value of $800. The court in its discretion refused the motion to set aside the judgment for excusable neglect. The defendants appealed.

H. F. Seawell for plaintiff.
J. J. Henderson and Parker & Long for defendants.
Coulter & Cooper for trustee in bankruptcy.

CLARK, C. J. The court, upon the hearing properly refused the motion to set aside the judgment for excusable neglect as to Quakenbush, and held that there was not any meritorious defense shown. *Mauney v. Gidney,* 88 N. C., 203; *Stockton v. Mining Co.,* 144 N. C., 595; *McLeod v. Gooch,* 162 N. C., 122; *Cahoon v. Brinkley,* 176 N. C., 5.

It is contended that in four months after the judgment Quakenbush was adjudged a bankrupt. Section 67 F of the Bankrupt Act, relied on by Quakenbush's trustee, has reference only to liens obtained by judgment within four months. This was a judgment on a valid mortgage made more than four months before the bankruptcy, and was valid against the trustee in bankruptcy unless the plaintiff had obtained an undue advantage thereby over the other judgment creditors. The defendant is estopped to deny the validity of the mortgage, but against this, nothing is alleged or shown as to Garrett. "The liability of a person who is codebtor with, or guarantor, or in any manner a surety for a bankrupt is not altered by the discharge of such bankrupt." Loveland on Bankruptcy, sec. 296. Garrett, being a codebtor, is not discharged by the bankruptcy of Quakenbush. *Murray v. Bass,* 184 N. C., 318.

It is contended, however, that the judgment should have been by default and inquiry and not by default final. In *Jeffries v. Aaron,* 120 N. C., 167, where there was a similar motion made, the court held that there being (as in this case) no ground to sustain the motion upon the allegation of mistake, surprise or excusable neglect, it could not be modified upon the ground of irregularity, saying: "The court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. He must set forth the facts showing *prima facie* a valid defense, and the validity of the defense

is for the court and not for the party. Although there was irregularity in entering the judgment, yet unless the court can now see reasonably that defendants had a good defense, or that they could now make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now and then be called upon soon thereafter to render just such another between the same parties? To avoid this the law requires that a *prima facie* valid defense must be set forth. *Jarman v. Saunders,* 64 N. C., 367; *English v. English,* 87 N. C., 497; *Mauney v. Gidney,* 88 N. C., 200."

It is true that in *Currie v. Mining Co.,* 157 N. C., 220, it is said that, if the amount for which the defendant is liable was not certain, the plaintiffs were not entitled to judgment by default final, and such judgment would be irregular, but, the judgment having been rendered, *Walker, J.,* said, in *Harris v. Bennett,* 160 N. C., 347: "Unless the Court can now see reasonably that the defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?" citing *Jeffries v. Aaron, supra; Cherry v. Canal Co.,* 140 N. C., 423; *Williamson v. Hartman,* 92 N. C., 236. This is repeated in *Hyatt v. Clark,* 169 N. C., 178, where the Court held: "Although there was irregularity in entering the judgment, yet, unless the Court can now see, reasonably," etc., as above quoted from *Jeffries v. Aaron.*

In *Land Co. v. Wooten,* 177 N. C., 250, the Court repeats the same quotation and the above citations, and says: "Why should the Court set aside the judgment unless its appears affirmatively that there is a meritorious defense?" And in the still later case of *Montague v. Lumpkins,* 178 N. C., 270, the Court says: "It is equally well settled that a judgment by default will not be set aside unless *facts* are alleged which, if true, would establish a defense," citing *Jeffries v. Aaron, supra,* approved in *Miller v. Smith,* 169 N. C., 210, and in other cases.

The Court, in this case, has properly found that there was no ground to set aside the judgment for excusable neglect, surprise, or mistake. There is neither allegation nor proof upon that ground, and, if there had been, in its discretion the Court could have still declined to set it aside.

The final judgment was regularly entered against Quakenbush on the note and mortgage. The contract of Garret on the replevin bond was for the return of the team, or their value, and the final judgment against him should not be reopened and modified by the judgment of default and inquiry but for the fact that he alleges that the value of the team, subject to prior mortgages under which they were seized and have been sold, did not equal the amount of the judgment. It was error in the court to refuse to permit him to offer evidence to that effect, and for

this reason he is entitled to have the judgment modified into one by default and inquiry, and evidence introduced to this effect.

As to the defendant McPherson, trustee in bankruptcy, the judgment is valid as to the lien of the mortgage, which was executed more than four months prior to the bankruptcy; and as to what extent the judgment shall otherwise share in the proceeds of the bankruptcy in his hands is a matter to be adjudged in the bankruptcy court. As to him and the principal, Quakenbush, the judgment below is *affirmed;* and as to the defendant Garret, it will be *modified* into a judgment by default, and inquiry only in order that the value of the team, for which he is responsible, subject to the prior mortgages, shall be ascertained before a jury.

Modified and affirmed.

STATE v. A. B. CRUTCHFIELD.

(Filed 23 April, 1924.)

Homicide—Criminal Law—Evidence—Verdict—Nonsuit—Statutes—Questions for Jury.

Evidence that the defendant, while driving his automobile at night at about 30 or 35 miles an hour, along a public highway, without lights, signals, or other warnings of approach, suddenly appeared and struck and killed a lad, going in the opposite direction, who was walking along the edge of the highway in a line with other boys, by turning in and out among them, is sufficient evidence to take the issue of murder to the jury, and to sustain a verdict of manslaughter, and to deny defendant's motion as of nonsuit under the provisions of C. S., 4643. The decisions of reckless driving of automobiles upon the public highways of the State in violation of statute, cited and applied.

APPEAL by defendant from *Lane, J.,* at December Term, 1923, of FORSYTH.

Criminal prosecution, tried upon an indictment charging the defendant with murder in the first degree. The jury convicted him of manslaughter, "with a request to the court for extreme mercy." From a judgment of not less than ten nor more than fifteen years in the State's Prison at hard labor, the defendant appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John D. Slawter and M. L. Mott, Jr., for defendant.

STACY, J. The defendant was charged with murder in the first degree, in that, it is alleged, he did unlawfully, feloniously and with

premeditation and deliberation murder and kill one Peter Leight, on or about 22 April, 1923, by striking him and running over him with an automobile.

The occasion and manner in which the deceased, a 6-year-old boy, was killed is succinctly described by James Crews, a witness for the State, as follows:

"On the evening of 22 April, 1923, six boys, including myself, went across the railroad to hear a band play (this was in the village of Walkertown), and as we came through a grove we picked up some pennants, or flags, which were attached to a string, being all on one string, and started down the road, each boy holding to the string of pennants. It was strung out full length as we were carrying it, one boy having hold of one end and another boy holding the other end, and the other boys scattered out between. We were all going south, on the left-hand side of the road, in the side-ditch. This was a soil-top road, about 35 feet wide, and we were going down the road, one after another, single file, in the side-ditch. I had hold of the back end, and George Leight had hold of the front end, and Peter Leight, the boy who was killed, had hold of the pennant in front of me. Peter was about 6 years old. As we were going along in the side-ditch, a Ford coupé dived in and hit Peter. I did not see the car until it was right on us. It was going north, meeting us, and when it struck Peter it knocked him about 30 feet. This was about 8 o'clock. The houses were all lighted. There were no lights on the car at the time it hit Peter, and the driver did not blow any horn. The car was running about 30 or 35 miles an hour. After the car struck Peter, it just kept on going at the same rate of speed; didn't stop at all."

Cross-examination: "Pete was standing out in the road, about 10 inches further than the other boys. The car was right at Pete before I saw it; I saw it just at the time it hit him; he was only about 4 or 5 feet in front of me, and a little bit out in the road. The car came in and went out, and missed me. If it hadn't cut back into the road it would have hit me also."

Redirect examination: "The car came in towards the bank, and then went out this way (illustrating). As it turned in, it struck Pete and turned immediately out. If it had gone straight along the road, it would not have hit any of us."

The defendant at first denied to the sheriff of the county that he struck the child, but later admitted doing so, and stated that he was not aware of it until his wife called it to his attention.

The State, also, in order to fix criminal responsibility on the defendant, offered evidence tending to show that he was drinking on the afternoon of the same day, and was in an intoxicated condition a short time after the homicide.

The defendant offered no evidence.

After the State had produced its evidence and rested its case, the defendant moved to dismiss the action or for judgment as of nonsuit, under C. S., 4643. This motion was properly overruled.

The record contains, in all, thirty exceptions and twenty-seven assignments of error, but apparently no one of them presents any new or novel point of law not heretofore settled by our decisions. We have examined all the assignments of error with care, and it would only be a work of supererogation and "threshing over old straw" to deal with them *seriatim* in an opinion. The case has been tried in substantial compliance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which we apprehend should be held for prejudicial or reversible error.

The law relating to the reckless driving of automobiles, in violation of statutes designed and intended to protect human life and limb, has been recently considered by us in the following cases: *S. v. Sudderth,* 184 N. C., 753; *S. v. Jessup,* 183 N. C., 771; *S. v. Rountree,* 181 N. C., 535; *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761.

There is no legal ground appearing on the record for a reversal of the judgment. The validity of the trial must be sustained.

No error.

STATE v. J. T. (TOM) SHEPHERD.

(Filed 23 April, 1924.)

Judgments Suspended — Conditions Broken — Sentence — Intoxicating Liquors—Criminal Law.

Where the defendant has been convicted of violating the prohibition law and agrees to and takes advantage of a suspension of a judgment against him, upon a specific condition that a certain sentence authorized by law shall be imposed should he violate the conditions, among others that he personally and entirely abstain from the use of intoxicating liquors, he cannot be heard to complain, upon the ascertainment by the court that he has violated this condition, that it was unreasonable, or that the sentence agreed upon could not properly be imposed.

APPEAL by defendant from *Stack, J.,* at October Term, 1923, of RICHMOND.

On the hearing, it was made to appear that at the July Term, 1922, Richmond Superior Court, the defendant pleaded guilty to violations of the prohibition law in two cases, Nos. 31 and 99.

The following judgment was entered in No. 31:

"Judgment having been pronounced against the defendant in No. 99, as set out in the record, and it appearing to the court that his near neighbors—prominent citizens—have come to the court in person and requested leniency and, if possible, reformation of the defendant, the court suspends this judgment for eighteen months, with the consent of the defendant and his counsel and of the solicitor, and upon the recommendation of his near neighbors, upon the following conditions:

"1. He is to abstain, personally, entirely, from the use of intoxicating liquors.

"2. He is to be of good behavior and show the court at each term that he has been of good behavior, and especially that he has not in any way whatever unlawfully dealt with, manufactured or sold or in any wise violated the liquor laws.

"3. He is required to give a bond in the sum of $1,500 to appear at each and every criminal term during this period of eighteen months and show to the court that he has abstained from the use of liquor himself, and has not in any wise violated the liquor law.

"4. The judgment is also suspended upon conditions that if he violates any of the requirements above set out—that is to say, indulge in the use of spirituous liquor or in any wise violate the law, that the court will enter a sentence against him of imprisonment in the county jail for twelve months and be assigned to work on the public roads of Richmond County. Defendant is in custody until the orders in No. 99 and No. 31 are complied with."

The record states that the defendant paid the fine imposed in No. 99, and also paid the costs in both cases, the costs of the *sci. fa.*, gave the appearance bond of $1,500, and was released from custody.

At the October Term, 1923, being one of the terms at which the defendant was to report and show compliance with the terms of the judgment entered in No. 31, it was found as a fact that he had violated one of the conditions of the suspended judgment, in that he failed "to abstain, personally, entirely, from the use of intoxicating liquors." Whereupon, the defendant was ordered into the custody of the sheriff, to be committed to the common jail for a period of twelve months and assigned to work on the public roads, as stipulated in the consent judgment entered at the July Term, 1922. From this order and judgment the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. S. Boggan and J. C. Sedberry for defendant.

STACY, J., after stating the case: It is the position of the defendant that the first condition of the suspended judgment, requiring him "to abstain, personally, entirely, from the use of intoxicating liquors," is unreasonable, and hence he should not be held to answer for its violation. We cannot so hold. This provision constitutes an integral part of the treaty, or covenant, which the defendant voluntarily entered into with the court. It is one of the terms of grace, upon the observance of which the original judgment was to remain suspended. Speaking to a similar question, in *S. v. Phillips,* 185 N. C., p. 620, *Walker, J.,* said:

"If the defendant was sentenced upon his pleas of guilty, and the judgment was suspended, or its immediate execution withheld, on a condition, and the State alleged a violation of that condition, and asked for the enforcement of the sentence because of the violation of the condition upon which it was based, the judge should have required the defendant to appear before him, by notice or by *capias,* if necessary, and inquire into the allegation of the State, and, if found to be true by him, he should have enforced the judgment or taken such other course as his finding may have justified."

It will be observed that the suspension of judgment in the instant case was upon specific, definite conditions, and not simply upon "good behavior" in general, as was the case in *S. v. Hardin,* 183 N. C., 815.

The Attorney-General also relies upon the following cases as supporting, either directly or in tendency, the order and judgment entered below: *S. v. Strange,* 183 N. C., 775; *S. v. Vickers,* 184 N. C., 677; *S. v. Hoggard,* 180 N. C., 678; *S. v. Greer,* 173 N. C., 759; *S. v. Everitt,* 164 N. C., 399.

There is no error appearing on the record.

Affirmed.

FARMERS AND MERCHANTS DEPOSIT COMPANY v. BOULEVARD BANK AND TRUST COMPANY.

(Filed 23 April, 1924.)

Banks and Banking—Bills and Notes—Drafts—Bills of Lading—Purchasers in Due Course—Payment—Actions—Claim and Delivery.

The collecting bank is responsible to the forwarding bank, which has become a purchaser, for value in due course and without notice, of a draft, bill of lading attached, for its payment under attachment of the consignor for shortage in the shipment, under a judgment against the consignee, when the collecting bank has collected the money on the draft, and the proceedings are taken and the judgment obtained without notice to the forwarding bank.

APPEAL by plaintiff from *Lane, J.*, at November Term, 1923, of ROCKINGHAM.

The Reed Grain and Milling Company, of Charlestown, W. Va., shipped a carload of wheat to D. E. Moore & Sons, of Leaksville, N. C., and on 13 March, 1921, drew a sight draft on the purchasers in favor of the plaintiff for $1,587.67, with a bill of lading attached. The wheat was delivered to the purchaser and the draft was collected by the defendant. Moore & Sons found a shortage in the wheat, and instituted an action against the Reed Grain and Milling Company to recover therefor in the sum of $179.26, and attached the proceeds of the draft, which were in the hands of the defendant. The plaintiff had no notice of the action. The defendant collected the draft of $1,587.26 and remitted to the plaintiff $1,408.41. The plaintiff brought suit to recover $179.26 as the balance due.

There was evidence tending to show that the plaintiff was the owner and holder of the draft in due course, without notice of the shortage or any other defect in the shipment, and that the defendant was notified of the fact. There was evidence for the defendant tending to show that it did not know that the plaintiff had purchased the draft or had any interest in it.

The verdict was as follows:

1. Is defendant indebted to the plaintiff? Answer: No.
2. If so, in what amount? Answer: Nothing.

Judgment for the defendant, from which the plaintiff appealed, assigning error.

Humphreys & Gwyn for plaintiff.
A. W. Dunn for defendant.

ADAMS, J. His Honor instructed the jury, in substance, as follows: If, after this money had been received by the defendant, a part of it ($179.26) was seized under attachment and taken by process of law from the defendant's custody, the defendant would not be liable to the plaintiff, and in that event the first issue should be answered in the negative. To this instruction the plaintiff excepted.

It was held, in *Finch v. Gregg,* 126 N. C., 176, that when a purchaser of goods has accepted and paid a draft drawn on himself by the consignor for the purchase price to a holder in due course, the consignee or purchaser may recover damages of the holder for the consignor's breach of warranty; but this principle was afterwards disapproved, the Court holding, on the contrary, that where a bank becomes a holder in due course of a draft drawn by the consignor on the consignee for the purchase price, with a bill of lading attached, the consignee takes the goods

subject to the rights of the holder of the bill of lading to the amount of the draft, and he cannot retain as against the holder the price of the goods on account of a debt due him by the consignor. *Mason v. Cotton Co.,* 148 N. C., 492. See, also, *Bank v. Hatcher,* 151 N. C., 359; *Latham v. Spragins,* 162 N. C., 404; *Lumber Co. v. Childerhose,* 167 N. C., 34; *Holleman v. Trust Co.,* 185 N. C., 49; C. S., 3038; 49 L. R. A., 679, note; 91 A. S. R., 212, note; 49 L. R. A. (N. S.), note; *Means v. Bank,* 146 U. S., 620; 36 L. Ed., 1107.

There is evidence tending to show that the plaintiff is a holder in due course of the draft and the bill of lading, and no evidence that the defendant gave to the plaintiff any notice whatever of the attachment, or of the pending suit, until some time after the defendant had obtained judgment in a justice's court.

Under these circumstances, his Honor misinstructed the jury, and for this error the plaintiff is entitled to a

New trial.

MARGARET J. WHITAKER v. THE SIKES COMPANY AND JOHN C. SIKES.

(Filed 23 April, 1924.)

Deeds and Conveyances—Mortgages—Married Women—Probate—Privy Examination—Fraud.

Where a married woman has signed a mortgage or deed in trust to secure borrowed money, she may not have it set aside upon allegation of fraud of the probate officer in taking her separate examination, when she admits that the examination was taken in substance of the requirement of the statute and she had signed the conveyance, and there is no evidence that the mortgagee in any manner participated in the fraud.

APPEAL by plaintiff from *Shaw, J.,* at February Term, 1924, of UNION.

This action was brought for the purpose of having declared null and void and canceled a deed of trust purported to have been executed by Margaret J. Whitaker, a married woman, on 6 March, 1922, to secure three separate notes, aggregating $1,420, for borrowed money. The plaintiff alleges that she is illiterate, can neither read nor write, and was induced to make her mark to said instrument by the false representation of a justice of the peace, who certified to her execution and acknowledgment and privy examination, as required by law, which she alleges was not taken nor attempted to be taken, and that she received no consideration for said notes, alleging that the Sikes Company was not an

innocent purchaser; that she did not sign nor make her mark in the notes referred to in the deed of trust, and, therefore, that the defendant, the Sikes Company, had notice that the transaction was incomplete.

The court, upon the evidence, directed judgment as a nonsuit, and the plaintiff appealed.

R. B. Redwine for plaintiff.
John C. Sikes and Vann & Milliken for defendants.

CLARK, C. J. The plaintiff, on her cross-examination, testified that she signed the paper that the justice of the peace presented to her, "freely and voluntarily, because she understood it to be upon the T. C. Irby land." The real question presented in this case is whether the "private examination of the plaintiff was taken by the justice of the peace to mortgage involved in this action." There is no allegation in the complaint, nor is there any evidence suggesting, that the defendants had any knowledge of, or was a party to, any fraud or misrepresentation committed or made by the justice of the peace. The certificate of the justice is in due form, and, there being no allegation or proof that the defendant was a party to any fraud therein, all question as to fraud, duress, or undue influence is cut off, and the sole question presented is whether the plaintiff's privy examination was actually taken. *Lumber Co. v. Leonard,* 145 N. C., 339; *Davis v. Davis,* 146 N. C., 166; *Brite v. Penny,* 157 N. C., 112.

In the case first cited, the court says as follows: "The certificate of the officer who took the privy examination of a married woman shuts off all inquiry as to fraud, duress, or undue influence in signing a deed of conveyance, unless participated in by the grantee or his agent. It also precludes all inquiry into fraud or falsehood in the *factum* of the privy examination itself, unless the *feme covert* can make it appear, by clear, cogent and convincing proof, *either that no such examination was had at all,* or that on such examination she refused to give her voluntary assent to the *execution of the instrument, and so expressed herself at the time to the officer who undertook to examine her.*"

The plaintiff admits that she signed the paper freely and voluntarily, and that she was alone with the justice at the time. It is true, she testified that the justice of the peace did not make the examination in the exact words of the statute; but in *Benedict v. Jones,* 129 N. C., 473, the Court held that this was not necessary if the acts and language of the married woman at the time of her examination were to the same legal effect, and that it makes no difference that she testified that she did not know what the paper contained, and that, if she had, would not have signed it.

Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside. C. S., 1001.

The plaintiff in this case admits that her privy examination was taken, and, there being neither allegation nor evidence that the defendant was a party or in any way connected with the alleged fraud of the justice of the peace, the court properly directed a nonsuit. There was nothing else for him to do, upon the evidence presented.

Affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY v. B. R. LACY, STATE TREASURER.

(Filed 23 April, 1924.)

1. Taxation—Statutes—Penalties.

The taxes to be paid by a railroad and other like corporations direct to the State are due and payable within thirty days from date of receipt of the assessment and levy (sec. 67a, ch. 92, Public Laws of 1920), subject to a penalty of 25 per cent of the amount of the taxes if not so paid, except in instances of appeal.

2. Same—Municipal and State Purposes.

The discount allowed to corporations paying their taxes before 30 November, and the penalty after 1 December, under the provisions of section 88, chapter 92, Public Laws of 1919, relate to county and other like municipal corporations, and this is not in conflict with section 67a, chapter 92, Public Laws of 1920, as to the taxes to be paid by such corporations direct to the State Treasurer for State purposes.

3. Same—Constitutional Law—Class Discrimination.

The provisions of the laws of 1919, and those of 1920, requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, etc., is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by our Constitution, Art. V, sec. 3.

APPEAL by plaintiff from *Daniels, J.* Controversy without action upon the following agreed facts:

1. Norfolk Southern Railroad Company, a corporation originally created under the laws of the State of Virginia and authorized to do business in the State of North Carolina, owns and operates a line of railroad running from the State line to Charlotte, North Carolina, and

has under lease certain other lines of railroads, one of which is the Durham and South Carolina Railroad.

2. Norfolk Southern Railroad Company, as lessee, is obligated to pay the taxes on the Durham and South Carolina Railroad Company's railroad property.

3. Norfolk Southern Railroad Company and Durham and South Carolina Railroad Company, in accordance with the laws of the State, duly listed with the State Tax Commission that part of their respective properties within the State which is under the law required to be listed with the State Tax Commission, and the said properties were duly valued by said Commission and the value so fixed was, by the State Tax Commission, duly certified to the State Auditor in order that he might, under the law, compute that part of the ad valorem property tax which was required to be paid direct to the State Treasurer.

4. The State Auditor duly computed the ad valorem property tax of thirteen cents (13 cents) levied under section 2 of chapter 1, Public Laws, Extra Session 1920 (An act entitled "An act to revise and limit tax rates for the year of 1920, in compliance with provisions of the Revaluation Act; to provide additional revenue for the State from franchise and license taxes, and for other purposes"), ratified .... August, 1920, and certified the taxes of Norfolk Southern Railroad Company and Durham and South Carolina Railroad Company to the State Treasurer.

5. The pertinent sections of said act are:

"Sec. 2. That section two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, entitled, 'An act to raise revenue,' be repealed and the following substituted for section two of that act:

"Sec. 2. Poll and property tax. That no tax on property or polls shall be levied for the year 1920 for the use of the State or for the State Pension Fund. There shall be levied and collected for the year 1920, for the benefit of the State public school fund, an ad valorem tax of thirteen cents on every one hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State and on each taxable poll or male between the ages of twenty-one and fifty years, except the poor or infirm whom the county commissioners may declare and record fit subjects for exemption, there shall be levied and collected for the year 1920 a tax of thirty-nine cents.

"Sec. 3. That section three of chapter ninety of the Public Laws of 1919 be repealed and designated as 'obsolete.'

"Sec. 4. That the taxes levied in the foregoing section two shall be collected and paid into the State Treasury for the benefit of the public school fund in the manner provided by law for the collection and settlement of State taxes."

6. State taxes in North Carolina are collectible under the provisions of chapter 92, Public Laws 1919, being an act entitled "An act to amend chapter 231 of the Public Laws of 1917, in relation to the assessment of property and the collection of taxes," ratified 10 March, 1919.

7. On 28 August, 1920, Norfolk Southern Railroad Company received a notice from the State Treasurer. (See copy attached, marked "A.") And Durham and South Carolina Railroad Company received a similar notice, except it was stated that its property was valued at $372,300, and its assessment for State school tax, 13 cents on each $100 valuation, was $483.99.

The franchise tax, so called, is not involved in this present controversy as the same has not been paid.

8. Norfolk Southern Railroad Company, on its own behalf and on behalf of its lessor, Durham and South Carolina Railroad Company, claimed, and so notified the State Treasurer, that under section 88 of chapter 92, Public Laws 1919, aforesaid, it could not be legally compelled to pay said taxes until 30 November, and when they were then paid it was entitled to a discount of 1 per cent, and that no penalty could be collected if paid on or before 31 December, 1920.

The State Treasurer would not accept this contention, but insisted that these taxes were due and payable under section 67a of said chapter 92, Public Laws of 1920, within thirty days from the date of receipt of notice of the assessment and levy, and if not so paid, Norfolk Southern Railroad Company and its lessor, Durham and South Carolina Railroad Company, would be subject to a penalty of 25 per cent of the amount of said taxes.

9. Norfolk Southern Railroad Company agreed with the Attorney-General of the State, to whom the matter had been submitted, that it would within said time, and in order to avoid the penalty, on its own behalf and on behalf of its lessor, Durham and South Carolina Railroad Company, pay the amount so demanded to the State Treasurer at the time demanded, and would, upon a case agreed, submit to the court the question of its right to the discount allowed in section 88 of said chapter 92, Public Laws 1917, and the right of the Treasurer to compel payment at said time.

10. Norfolk Southern Railroad Company, under protest, then paid to B. R. Lacy, Treasurer of the State of North Carolina, the full sum demanded of it, and its lessor, Durham and South Carolina Railroad Company, to wit:

For itself, the sum of $35,130.50.

For D. & S. C. R. R. Co., $483.99.

11. Norfolk Southern Railroad Company has duly made written demand upon said B. R. Lacy, State Treasurer, that he return to it

the portion of said payments claimed by it to be in excess of the correct amount of the taxes justly chargeable and collectible against it at the said time, which excess it claims to be one per cent (1%) of the said amount of taxes, pursuant to section 88 of chapter 92 of Public Laws of 1919, and an additional one per cent (1%) as damages on account of its being required to make said payments sixty days earlier than the time in which it was entitled to pay.

12. And the parties hereto now submit the questions in controversy to the court as follows:

(*a*) Was Norfolk Southern Railroad Company entitled to the discount of 1 per cent allowed under section 88 of said chapter 92, Public Laws 1919?

(*b*) Was Norfolk Southern Railroad Company entitled as a matter of right, under said section 88, to wait until 30 November to pay said taxes, and then to pay same subject to a discount of 1 per cent, or to wait until 31 December to pay said taxes without discount, and if so, is Norfolk Southern entitled to interest on the sum so paid from 28 September to 30 November as damages for payment of 28 September to avoid penalty?

Judgment for defendant and appeal by plaintiff.

R. N. Simms for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

ADAMS, J. This action was instituted in the Superior Court of Wake County on 29 November, 1920, to determine the rights of the plaintiff in regard to the payment of taxes. It involves the construction of certain statutes enacted in 1919 and 1920, a brief review of which is necessary to an understanding of the plaintiff's position.

The Machinery Act of 1919, Public Laws of 1919, ch. 92, contains the provisions herein set out. Section 61 provides that the State Tax Commission, now the State Department of Revenue (Public Laws 1921, ch. 40), shall constitute a board of appraisers and assessors for railroad, canal, and steamboat companies and other companies exercising the right of eminent domain. Section 62 requires an officer of each company to return for assessment and taxation under oath or affirmation all the property belonging to such corporation within the State, described as follows: "The number of miles of such railroad lines in each county in this State and the total number of miles in this State, including the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, and the land upon which situated and necessary to their use; water stations and land, coal chutes and land, and real estate and personal

property of every character necessary for the construction and successful operation of such railroad or used in the daily operation, whether situated on the charter right of way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Tax Commission, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: *Provided, however,* that all machine and repair shops, general office buildings, storehouses and contents located outside of the right of way, and also real and personal property, other than the property as returned above to the State Tax Commission, shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property." Section 64, after prescribing the method of valuing the tangible property and the franchise of the company, provides in paragraph *c* that the State Tax Commission on or before 1 September shall certify to the Auditor of the State, chairman of the county commissioners, and the mayor of each city or incorporated town the amount apportioned to his county, city, or town, that all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the Treasurer of the State within thirty days after 1 July of each year, and that upon failure to make such payment the company shall be liable to suit and to a penalty of 25 per cent of the tax. In section 67a there is a provision that the taxes due the State shall be paid by the secretary or treasurer of the company to the Treasurer of the State within thirty days after the receipt of a bill for the taxes due; but as we construe the several statutes the two clauses designating the time of payment are not in conflict. By virtue of section 65 the Commission is authorized to give a hearing to any interested company touching the valuation and assessment of its property. If such hearing is not had and there is no other obstacle in the way, the tax should be paid within the time fixed in section 64 (*a*); but if there is a hearing, then within the time fixed in section 67a. However, no question is presented in regard to unreasonable delay in making payment, and we refer to the alleged conflict in deference to the argument advanced by the plaintiff.

The following provision appears in section 88: "All taxes shall be due on the first Monday in October in each year, and on all taxes paid in the months of October and November a discount shall be given to the taxpayer of 1 per cent. All taxes paid in the month of December shall be paid at the net amount charged, and from and after 1 January a penalty of 1 per cent per month shall be charged and collected by the sheriff or tax collector; that is to say, that on all taxes paid in the month

of January, after 1 January, a penalty of 1 per cent shall be added on the taxes paid, and in the month of February, after 1 February, a penalty of 2 per cent shall be added, and an additional penalty of 1 per cent for each additional month of delay in settlement of same." The plaintiff contends that it is entitled to the discount provided in this section, and the defendant insists that the provision has no application to the taxes which each company is directed to pay to the Treasurer of the State, and that it applies exclusively to taxes paid to the sheriff or tax collector of each county or municipality. In our opinion the defendant's position is the correct one. The plaintiff was entitled to the benefit of section 88 on all taxes collected by the sheriff or tax collectors of the various counties in which certain of its property was listed by virtue of the proviso in section 62, but not on the taxes payable to the Treasurer of the State under sections 64 and 67a. This is obvious from the context. The discount allowed by virtue of section 88 relates to the tax list placed in the hands of the sheriff for collection and not to taxes paid directly to the Treasurer of the State under the provisions of section 64 (*c*) or section 67a.

The plaintiff further contends that if this is the correct interpretation, section 88 was enacted in breach of the constitutional requirement that laws shall be passed taxing by a uniform rule all real and personal property, according to its true value in money. Constitution, Art. V, sec. 3. We do not assent to this proposition. It has been said that perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream. *Edge v. Robertson* and *Cunard Co. v. Robertson* (Head Money Cases), 112 U. S., 580; 28 Law. Ed., 798; *State Railroad Tax Cases,* 92 U. S., 612; 28 Law. Ed., 663. With reference to locality, a tax is uniform when it operates with equal force and effect in every place where the subject of it is found (*Edge v. Robertson, supra*), and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class. Tested by this standard, the tax which the plaintiff impeaches cannot be declared void on the ground that it conflicts with the uniformity clause of the State Constitution. Cooley on Taxation, ch. 6; Desty on Taxation, 1119; *Gatlin v. Tarboro,* 78 N. C., 119; *S. v. Powell,* 100 N. C., 525; *Lacy v. Packing Co.,* 134 N. C., 567; *Land Co. v. Smith,* 151 N. C., 70.

The plaintiff's further contention that section 88 denies to it the equal protection of the laws is at variance with the decision of the Supreme Court of the United States in *Railway Company v. Watts,* 260 U. S., 519; 67 Law. Ed., 375, and in *Railroad Co. v. Doughton,* 262 U. S., 413; 67 Law. Ed., 1051.

The judgment of the Superior Court is

Affirmed.

R. N. PAGE, H. E. GIBBONS, AND H. A. PAGE, TRUSTEES FOR THE ROCKINGHAM DISTRICT, METHODIST EPISCOPAL CHURCH, SOUTH, *v.* L. S. COVINGTON.

(Filed 23 April, 1924.)

Deeds and Conveyances—Charitable Gifts—Intent—Power of Sale—Religion.

A deed to a house and lot to the trustees of a certain district of a religious denomination, to be used as a home for the ministers of that denomination in the district, with *habendum* that it be held, kept, maintained and disposed of as such place of residence, will be construed as a whole to effectuate the beneficent intent of the grantor, and the use of the words "disposed of" in the *habendum* was consistent with the purposes expressed in the conveyancing clause, and the trustees named, and their successors, may sell the whole as well as a part thereof and hold and apply the proceeds for the expressed purposes of the gift.

APPEAL by plaintiff from *Shaw, J.*, at March Term, 1924, of RICHMOND.

Civil action. Controversy without action. Agreed case is as follows:

1. That R. N. Page, H. E. Gibbons and H. A. Page are trustees for the Rockingham District Methodist Episcopal Church, South, and are the successors in office of J. S. Oliver, B. Stansel, L. P. Bird, W. H. Neal, H. D. Gibson, H. S. Ledbetter, and H. C. Wall, who are the grantees in a deed from Ann C. Leak and H. C. Wall and wife, Fannie L. Wall, dated 1 January, 1895, and which is registered in the office of the register of deeds for Richmond County in Book FFF, at page 48.

2. That on 1 January, 1895, Mrs. Ann C. Leak, H. C. Wall and wife, Fannie L. Wall, sold and conveyed a lot in the town of Rockingham to the parties named in said deed, as trustees for the Rockingham District of the Methodist Episcopal Church, South, which said deed is in the following words:

NORTH CAROLINA—Rockingham County.

This indenture, entered into this 1 January, A. D. 1895, by and between Ann C. Leak, H. C. Wall and wife, Fannie L. Wall, parties of the first part, and J. S. Oliver, B. Stansel, L. P. Bird, W. H. Neal, H. D. Gibson, H. S. Ledbetter and H. C. Wall, trustees for the Rockingham District, Methodist Episcopal Church, South, and their successors in office, parties of the second part.

Witnesseth: That the parties of the first part (H. C. Wall and wife being parties to and joining in this conveyance in order to make a complete legal conveyance), for and in consideration of the erection by said Rockingham District of a dwelling-house on the lot hereinafter described, to be used as a home for such ministers of the church aforesaid as may be from time to time duly appointed and sent to said Rock-

ingham District, as well as the further consideration of the sum of $10 to them paid by the parties of the second part, the payment and receipt of which is fully admitted, have bargained, given, granted and sold, and by these presents hereby give, grant and convey unto the said parties of the second part and their successors in office a lot or parcel of land in the town of Rockingham, N. C., more particularly described as follows:

Beginning at a stake in the south edge of Washington street, southeast corner of Z. F. Long's residence lot, and runs with Washington Street north 79 east 1.68 chains to a stake; thence north 12 west parallel to Z. F. Long's line 6.32 chains to a stake; thence south 79 west parallel to Washington Street 1.58 chains to a stake in Z. F. Long's line; thence south 12 east with this line south 6.32 chains to the beginning, containing one acre, more or less.

To have and to hold the above described lot or parcel of land unto them, the said J. S. Oliver, B. Stansel, L. P. Bird, W. H. Neal, H. D. Gibson, H. S. Ledbetter and H. C. Wall, trustees for the Rockingham District of the North Carolina Conference of the M. E. Church, South, and their successors in office, in trust that the said premises shall be held, kept, maintained and disposed of as a place of the residence for the use and occupancy of the preachers of the Methodist Episcopal Church, South, who from time to time be appointed in said place, subject to the use and discipline of said church as from time to time authorized and declared by the general conference of said church and the annual conference within whose bounds the said premises are situate.

In witness all of which the said parties of the first part have hereto set their hands and affixed their seals, the day and date first above written.

ANN C. LEAK. (Seal.)
H. C. WALL. (Seal.)
F. L. WALL. (Seal.)

3. That the defendant has agreed to purchase the northern half of said lot from the plaintiffs, provided a good and indefeasible deed, in fee simple, and with the usual covenants of warranty, can be made, upon a price agreed upon between the plaintiffs and defendant.

4. The plaintiffs have agreed to convey said lot to the defendant, and have tendered a deed with the usual covenants of warranty, conveying an absolute title in fee simple to the defendant, but the defendant declines to accept said deed for the reason that the plaintiffs cannot convey a fee-simple title under the terms of the deed from Ann C. Leak and H. C. Wall and wife to J. S. Oliver and others, trustees for the Rockingham District, Methodist Episcopal Church, South, and which is dated 1 January, 1895.

5. That the only point of contention between the plaintiffs and the defendant is one of law as to whether or not, upon the facts hereby agreed to, the plaintiffs, as trustees of the Rockingham District of the Methodist Episcopal Church, South, are the owners in fee simple of the lands described in said deed and which they propose to convey to the defendant.

That all the rules and regulations required by the discipline of said church have been complied with, and the action was taken for the sale of said property by order of the District Conference of the Rockingham District, being the district conference having jurisdiction of the property.

That the trustees propose to use the funds derived from the sale of the said property for the benefit of the said district parsonage, either remodeling and improving the present parsonage situate on another part of the property, or in the purchase of a lot and building another building for the same purpose at some other location, this to be done by the trustees of said district as provided for by the discipline, to be held as a place of residence for the use and occupancy of the preachers of the Methodist Episcopal Church, South.

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, Thos. J. Shaw, judge presiding, at the March term of this court upon the facts set forth in the 'agreed case' herein, and it appearing to the court that it is the intention of the plaintiffs in this action as trustees to sell and convey the lot as described in the agreed case, and which is a part of the lot referred to in the deed from Mrs. Ann C. Leak *et al.* to J. S. Oliver *et al.,* trustees, as appears in the agreed case, and the proceeds derived from said sale will be used by the trustees of said Rockingham District in improving and remodeling the building used as a parsonage on a part of said lot or in the purchase of another lot on which will be erected another building for the same purpose; and the court being of the opinion that the plaintiffs as trustees have the right to sell and convey said lot to the defendant in fee simple:

"It is, therefore, on motion, ordered, adjudged and decreed that the plaintiffs as trustees have full power, right, and authority to convey said land described in the case agreed to the defendant by warranty deed in fee simple, and upon payment by defendant of the amount agreed upon, the plaintiffs, as trustees, are authorized, instructed and empowered to deliver said deed to the said defendant, and upon such delivery the defendant will own said lot in fee simple."

The defendant excepted to the judgment and assigned error, and appealed to the Supreme Court.

Nash & Morgan for plaintiffs.
Bynum & Henry for defendant.

CLARKSON, J. It will be noted that the trust in the *habendum* clause of the deed is as follows: *"That the said premises shall be held, kept, maintained and disposed of* as a place of the residence for the use and occupancy of the preachers," etc. We must gather the intention of the good people who made the praiseworthy gift from the entire instrument. We think a fair and just interpretation is that the land should be "held, kept and maintained as a place of the residence," etc., and when "disposed of" the fund should be reinvested and used according to the clear terms of the deed, "as a place of the residence for the use and occupancy of the preachers of the Methodist Episcopal Church, South," etc.

The intention of the grantors is shown by the words used—"disposed of." We cannot nullify these plain words, they are used in the deed. What is the meaning of *disposed of?*

Webster defines *disposed of* as follows: "To exercise finally one's power of control over; to pass over into the control of some one else, as by selling; to alienate; to part with; to relinquish; to get rid of; as, to dispose of a house; to dispose of one's time."

9 Am. & Eng. Enc., p. 540, says: "To *dispose of* means to determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc.; to direct or assign for a use. To *dispose of* means to alienate; to effectually transfer."

"To dispose of means to part with, to relinquish, to get rid of, to alienate, to effectually transfer." *Connely v. Putnam,* 51 Tex. Civ. App., 233.

"The definitions, that to 'dispose of' property is to alienate it, assign it to a use, bestow it, direct its ownership, and that it is to part with, to sell, to alienate, embrace both the popular and legal significance of the word, when used in an attachment law in connection with property." *Pearre v. Hawkins,* 62 Tex., 434, 437.

"*Dispose,* in the sense in which it is used in the Constitution of the State of New York, means 'to part with to another'; 'to put into another power and control,' or 'to give away or transfer by authority.'" *Newcomb v. Newcomb,* 12 N. Y., 603, 620; Words and Phrases, vol. 2 (2 ed. series), p. 80.

It will be noted that only a part of the lot in this controversy is sought to be sold. We think the definition of "disposed of" herein declared applies not only to the part in controversy but to the entire property. The proceeds must be held and invested in accordance with the terms of the trust set forth in the deed. We think the judgment in regard to this carries out in good faith the reasonable and righteous purposes

of the trust. "And the proceeds derived from said sale will be used by the trustees of said Rockingham district in improving or remodeling the building used as a parsonage on a part of said lot or in the purchase of another lot on which will be erected another building for the same purpose."

The words in the "witnesseth" clause of the deed, "to be used as a home for such ministers of the church," etc., do not restrict or limit the words *disposed of* in the *habendum* clause of the deed. We think from the whole deed the intention clear and the right to *dispose of* the property given the trustees.

From the words used, "disposed of," in the deed we think it unnecessary to discuss the cases dealing with trusts of this kind, and the power of disposition and cases cited and discussed by both sides on the argument of this case and in the briefs. We refer to them: *St. James v. Bagley,* 138 N. C., 384; *Hayes v. Franklin,* 141 N. C., 599; *Church v. Bragaw,* 144 N. C., 126; *Church v. Ange,* 161 N. C., 314; *College v. Riddle,* 165 N. C., 211.

We can see no error in the judgment of the court below.

Affirmed.

J. A. LEAK, JR., AND R. E. LITTLE, JR., PARTNERS UNDER THE FIRM NAME AND STYLE OF LEAK & LITTLE, v. J. L. ARMFIELD AND WIFE, DION G. ARMFIELD, AND CHASE BOREN.

(Filed 23 April, 1924.)

Mortgages—Power of Sale—Deeds and Conveyances—Fraud—Equity—Injunction—Tender—Payment.

The unsecured creditors of the mortgagor, who seek to set aside his deed for fraud, must first make tender to the mortgagee or pay off the mortgage, when by its terms the power of sale therein may be exercised, before they are entitled to the equitable relief of enjoining the sale upon the ground stated, for otherwise they can obtain no equitable right against the mortgagee for the relief sought, without which the courts cannot interfere under the rules of equity applying in such instances.

APPEAL by Chase Boren from *Shaw, J.,* at October Term, 1923, of GUILFORD.

Civil action. On 7 April, 1920, the defendant J. L. Armfield and wife, Dion G. Armfield, executed to Chase Boren, the defendant (now Mrs. D. M. Stafford), for balance purchase price of land, a mortgage on a certain piece of land in the city of Greensboro, N. C. The condition of said mortgage is as follows:

"*Provided always,* and these presents are upon the express condition that if the said parties of the first part pay, or cause to be paid, to the

said party of the second part the full sum of $30,000 on or before 1 April, 1923, with interest thereon, payable annually at the rate of 6 per cent per annum till paid, according to the terms of five certain bonds as follows: Two notes of $5,900 each due 1 April, 1921, one note of $8,400 due 1 April, 1922, one note of $5,900 due 1 April, 1923, and one note of $3,900 due on 1 April, 1923, bearing even date herewith, executed by the said J. L. Armfield, then these presents and the said bond shall determine and be void. But in case of the nonpayment of the said sum of $30,000, or any part thereof, together with its interest at the time above limited, then in such case it shall be lawful for the said party of the second part, her heirs, executors, administrators or assigns, and they are hereby so empowered to sell and convey the above described premises, or any part thereof, at public auction to the highest bidder, for cash, after advertising the same for thirty days at least, and on such sale to execute to the purchaser sufficient deeds therefor, apply the proceeds of such sale to the discharge of said debt and interest, rendering the overplus moneys, if any, to the said parties of the first part, or legal representatives, after deducting the cost of such sale and registration of this deed."

The notes secured by the mortgage are now owned by the following persons:

W. C. Boren, Jr.	$5,900.00
Miss Chase Boren (now Mrs. D. M. Stafford)	5,039.00
Mrs. Clara Peebles	5,039.00
Mrs. Louise Andrews	5,900.00
Mrs. Mamie Spence	8,400.00

The interest on all of said notes is due and unpaid from 1 April, 1922, subject to a payment of $1,400 to W. C. Boren, Jr., on his note made some time since 1 April, 1923. Mrs. Clara Peebles' note is $5,900, but $861 has been paid on the principal; all of said indebtedness is due and the holders of said notes have called upon Chase Boren to sell the land described in the mortgage.

On 22 April, 1920, J. L. Armfield executed a deed to his wife, Dion G. Armfield, for the equity of redemption in said land.

The plaintiffs obtained a judgment against J. L. Armfield and brought this action to set aside the deed made by J. L. Armfield to his wife, Dion G. Armfield, on the ground of fraud. The prayer of plaintiffs is that the conveyance "be declared void and set aside in so far as the same affects the rights of plaintiffs, and that it be decreed that the

property therein described be subjected to the payment of the judgment hereinabove set out, *subject to the rights of the defendant Chase Boren,"* etc.

During the pendency of the case, Chase Boren gave notice to plaintiffs as follows:

"And whereas all of said notes have become due and the holders of said notes have applied to Miss Chase Boren for her to sell real estate to pay the indebtedness due thereon, as default has been made in payment of the same; and whereas it is the duty under the trust deed of the said Miss Chase Boren to make sale of said property to pay said indebtedness when called upon to do so; and whereas the plaintiff in this action and the defendants, other than Miss Chase Boren, have threatened to restrain in the sale under the power contained in said trust deed, but the said Miss Chase Boren is going to sell under the said power of sale on 8 October, 1923, at the courthouse door in Greensboro, N. C., unless she is restrained or enjoined from doing so: Now, therefore, take notice that you are required to appear before his Honor, T. J. Shaw, on 8 September, 1923, at the courthouse in Greensboro, N. C., and show cause, if any you have, why the said Chase Boren should be restrained from making the aforesaid sale."

The hearing was continued until October term of court.

There was another case pending in the Superior Court of Guilford County against the same defendants as in this case, entitled *"T. J. Finch, Receiver of the Bank of Thomasville and the Bank of Beaufort, v. J. L. Armfield, Dion G. Armfield, and Miss Chase Boren,"* setting up that the plaintiffs in said action were creditors of the said J. L. Armfield, and asking for the same relief as the plaintiffs ask in this action, the purpose of both actions being to set aside the deed from J. L. Armfield to his wife, Dion G. Armfield, as a fraud upon the creditors. Both cases were calendared for trial on the first day of court, 1 October, 1923, and were consolidated for the purpose of trial, and a trial was had, consuming the first three days of court. But a juror was run over by an automobile and was unable to serve further, and his Honor withdrew a juror and made a mistrial, and the court then heard the motion to restrain the sale under the mortgage deed.

At the hearing the court made an order restraining the defendant Chase Boren from selling the property and appointed a receiver. From the order made, Chase Boren excepted, assigned error, and appealed to the Supreme Court.

Jas. A. Lockhart and King, Sapp & King for plaintiffs.
Brooks, Parker & Smith for Dion G. Armfield.
J. A. Spence for Chase Boren.

CLARKSON, J. The sole question presented is, Did the court below commit error in restraining the sale?

In *Lea v. Johnson,* 31 N. C., 19, *Pearson, J.,* said: " 'Hard cases are the quicksands of the law.' In other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law."

In *Cureton v. Moore,* 55 N. C., 207, it was said: "A court of equity can no more relieve against 'hard cases,' unless there be some ground of equity jurisdiction, than a court of law, for both courts act upon general principles. Equity, as well as law, is a science, and does not depend upon *the discretion* of the court entrusted with equity jurisdiction, or the vague ideas that may be entertained as to 'hard cases.' "

In the instant case, the learned and conscientious judge who heard this case and granted the injunction found as a fact "that the property sought to be sold under said mortgage is now in controversy, and the conveyance of said property from J. L. Armfield to Dion G. Armfield is being attacked by creditors of the said J. L. Armfield, and that the mortgage indebtedness of Miss Chase Boren is not controverted, and that a sale of said property as advertised on 8 October, 1923, by the said mortgagee would be prejudicial to the interests of all parties to the action, except Miss Chase Boren, and that the security held by her is amply sufficient to cover her debt."

It nowhere appears in the record that Chase Boren consented to the procedure in which she was made a party or waived any right. This being so, from the facts found by the court below as a matter of law, we think that the restraining order ought not to have been granted.

If subsequent judgment creditors or litigants over the equity of redemption could "tie up" a first mortgage and effect its terms, it would seriously impair a legal contract. It may be "hard measure" to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a "scrap of paper." It is a legal contract that the parties are bound by. The courts, under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage.

Allen, J., in *Bonner v. Rodman,* 163 N. C., 2, says: "The plaintiff admitted that he owed the defendant $436, and it was therefore within the power of the court, upon the facts appearing in this record, to re-

quire the payment of this sum within a reasonable time before granting equitable relief, upon the familiar principle that he who seeks equity must do equity, although a case might arise in which the court could refuse to impose such a condition. An order similar to the one appealed from was approved in *Pritchard v. Sanderson,* 84 N. C., 299." Story's Eq. Jurisprudence (14 ed.), sec. 1369.

In *Smith v. Connor,* 65 Ala., 371, it was said: "When subsequent purchasers or encumbrancers file a bill in equity against the first mortgagee, asking an account and redemption, and not denying that there is a balance due on the mortgage debt, it follows that they ought to make a tender in the bill or offer to pay whatever may be found due."

The prayer in the plaintiffs' complaint recognizes the mortgagee's rights and the prayer is made "subject to the rights of the defendant Chase Boren," etc.

For the reasons given there was

Error.

E. S. PORTER AND SEABOARD SUPPLY COMPANY, ASSIGNEE, v. S. E. CASE, CHERO-COLA BOTTLING COMPANY, RALPH LONG, AND NICHOLAS MITCHELL.

(Filed 23 April, 1924.)

1. Liens—Contracts—Material Furnishers.

Where the owner has contracted for the erection of a building on his premises, in order for him to acquire a statutory lien thereon, it is required that the contractor file his lien before a justice of the peace or the clerk of the court, according to jurisdiction, within six months from the time moneys are due him, under the terms of his contract, by the owner (C. S., 2470), and bring his action to enforce the same within six months thereafter. C. S., 2474.

2. Same—Subcontractor—Notice—Actions—Statutes.

Where the owner of the building being erected has been given notice of the subcontractor's claim for labor and material furnished to the contractor before the owner settles with the contractor, he must account for and pay to the subcontractor the sum so due, or prorate the same among like claimants, as the case may be. C. S., 2438, 2440, 2442. And the subcontractor may enforce this lien by action commenced within the six-months period from the time of the giving of such notice. C. S., 2479 (4). If the action is not brought within six months to enforce the lien, a personal action can be maintained against the owner. *Campbell v. Hall, ante,* 464.

3. Same—Priorities.

Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor

relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take *cum onore*, and subject to the contractor's or subcontractor's lien so acquired.

4. Same—Evidence—Nonsuit—Appeal and Error.

The right of the contractor's lien depends upon the existence of a contract, express or implied; and where, in the contractor's action to enforce his lien, there is sufficient evidence thereof, an issue for the determination of the jury is raised, and the granting of the motion as of involuntary nonsuit against him is reversible error.

APPEAL by plaintiff from *Lane, J.*, at November Term, 1923, of FORSYTH.

This is a civil action. The defendant Ralph Long, trading under the name of the Chero-Cola Bottling Company, owned a lot in fee in the city of Winston-Salem, N. C.

E. S. Porter and Seaboard Supply Company, assignee, allege in part:

"That on or about 7 January, 1920, the plaintiff, E. S. Porter, S. E. Case, Nicholas Mitchell, Ralph Long, and the Chero-Cola Bottling Company entered into a contract, by the terms of which the plaintiff E. S. Porter agreed to furnish the necessary materials at retail prices and to furnish the necessary labor for installing a plumbing system at the regular scale as adopted in Winston-Salem, N. C., in the building being erected upon the property of the Chero-Cola Bottling Company. That, pursuant to said contract and agreement, the plaintiff began to furnish the necessary material and perform the necessary labor as he contracted to do on or about 7 January, 1920, and completed same on or about 29 July, 1920, the cost of material and labor on same amounting to $3,360.37. That prior to the payment by the Chero-Cola Bottling Company for the construction of the building, this plaintiff filed an itemized statement of his claim with the Chero-Cola Bottling Company, and since that time has made frequent demands upon it and the defendants Case and Mitchell for the payment of his claim, but each of them have failed and neglected to pay the same; that on 3 January, 1921, and within six months after the completion of his contract, plaintiff filed in the office of the clerk of the Superior Court of Forsyth County, N. C., and had docketed in the mechanics', laborers', and material furnishers' lien record his claim for $3,360.37."

The defendants Ralph Long, trading as Chero-Cola Bottling Company, and Piedmont Chero-Cola Bottling Company, answering the complaint of plaintiffs, allege in part:

"It is denied that the plaintiffs or either of them has ever filed an itemized statement of his claim with or given any other notice of such claim to said Ralph Long, trading as Chero-Cola Bottling Company, or

to the Piedmont Chero-Cola Bottling Company; it is denied that the plaintiff, E. S. Porter, has demanded of either of these defendants the payment of this claim."

For a further defense the defendants aver:

"That on 28 November, 1919, the defendant Ralph Long entered into a contract with S. E. Case whereby S. E. Case agreed to construct a building on the property described in the complaint according to certain specifications therein set out, and that under the terms of said contract a complete plumbing system as specified therein was to be installed by the said S. E. Case; that about that time or shortly thereafter the plaintiff, E. S. Porter, formed a partnership with the said S. E. Case for the purpose of conducting a real estate and construction business; that S. E. Case and E. S. Porter were partners at the time set out in the complaint, in the real estate and construction business. . . .

"That this defendant made full settlement with the said S. E. Case; the plaintiff, E. S. Porter, at no time notified this defendant that he had any claim against him, or was asserting any claim to a lien as a subcontractor against the premises on which the building was erected; and that although the plaintiff, E. S. Porter, well knew that such payment was being made to the said S. E. Case he said nothing, did not notify the defendant Ralph Long that he had or would assert any claim whatever against him on this account, and that the said Ralph Long therefore believed that E. S. Porter had no such claim, and did not believe that the said E. S. Porter was doing the plumbing work as a subcontractor but as partner to S. E. Case, and relying on such belief he made full settlement with the said S. E. Case, and therefore this defendant alleges that the plaintiff, E. S. Porter, should be estopped from now setting up his claim. . . ."

And for a further defense the defendants allege:

"That the plaintiffs did not institute their action against these defendants or any of them within six months after giving of the notice of the claim of the plaintiff, E. S. Porter, as alleged in the complaint, and therefore these defendants plead the statute of limitations (chapter 49, Consolidated Statutes) in bar of plaintiff's recovery, and in bar of the plaintiff's right to a lien on said property. These defendants further plead that the Piedmont Chero-Cola Bottling Company, a corporation, purchased said property from the defendant Ralph Long without notice of any claim on the part of the plaintiffs, and paid a valuable consideration therefor."

Ralph Long answers and says in part:

"It is denied that the plaintiff, E. S. Porter, has ever filed an itemized statement of his claim with or given any other notice of such claim to the defendant Ralph Long, or the Chero-Cola Bottling Company, which

was the trade name under which the defendant Ralph Long was doing business prior to 28 September, 1920. It is denied that the plaintiff, E. S. Porter, has demanded of this defendant the payment of his claim." On 28 September, 1920, Ralph Long sold and conveyed the property to the defendant Piedmont Chero-Cola Bottling Company.

For a further defense the defendant avers:

"That on 28 November, 1919, the defendant Ralph Long entered into a contract with S. E. Case whereby S. E. Case agreed to construct a building on the property described in the complaint, according to certain specifications therein set out, and that under the terms of said contract a complete plumbing system as specified therein was to be installed by the said S. E. Case; that about that time or shortly thereafter the plaintiff, E. S. Porter, formed a partnership with the said S. E. Case, for the purpose of conducting a real estate and construction business; that E. S. Porter at all times during the construction of said building on the property described in the complaint held himself out as a partner of the said S. E. Case. . . . That he made full settlement with the said S. E. Case, and therefore this defendant alleges that the plaintiff, E. S. Porter, should be estopped from now setting up his claim."

And for a further defense the defendant alleges that:

"The plaintiffs did not institute their action against the defendant within six months from the time of the alleged notice from E. S. Porter to Ralph Long of the said Porter's claim, and the defendant therefore pleads the statute of limitations (C. S., ch. 49) in bar of the plaintiff's recovery and in bar of the plaintiff's claim to a specific lien against said property."

The work was completed 29 July, 1920, and the notice of lien was filed in clerk's office on 3 January, 1921. Suits were instituted as follows:

"Summons for relief entitled *E. S. Porter v. S. E. Case, Nicholas Mitchell, and Ralph Long* was issued on 28 February, 1921, served by sheriff of Forsyth County on 10 March, 1921.

"Summons for relief entitled *E. S. Porter and Seaboard Supply Company, Assignee, v. Ralph Long* was issued 19 October, 1922, served by sheriff of Forsyth County on 24 October, 1922.

"Summons for relief entitled *E. S. Porter and Seaboard Supply Company, Assignee, v. Chero-Cola Bottling Company and others* was issued 18 October, 1922, served by sheriff of Forsyth County on 24 October, 1922.

"Summons for relief entitled *E. S. Porter and Seaboard Supply Company, Assignee, v. S. E. Case, Nicholas Mitchell, Chero-Cola Bottling Company and Piedmont Chero-Cola Bottling Company* was issued 18 October, 1922, served by the sheriff of Forsyth County on 24 October, 1922."

Porter assigned his claim to the plaintiff, Seaboard Supply Company, from whom he purchased material to go into the plumbing contract, and by order of court allowed to be made a party plaintiff. Piedmont Chero-Cola Bottling Company, by order of court, was made a party defendant.

Complaints, amended complaints, answers, amended answers, etc., were filed without objection.

Plaintiff took a voluntary nonsuit as to defendant Mitchell. At the close of the plaintiffs' evidence the court below nonsuited the plaintiffs; they excepted, assigned error, and appealed to the Supreme Court.

Other material evidence and facts are set forth in the opinion.

Jno. C. Wallace and Graves, Brock & Graves for plaintiffs.
Parrish & Deal for defendants.

CLARKSON, J. The contention of plaintiff E. S. Porter is that Ralph Long, who was trading under the name of Chero-Cola Bottling Company, made a contract with S. E. Case to *erect a building* on the land, the deed to which was in Long's trade name, "Chero-Cola Bottling Company," and secured the plaintiff E. S. Porter to put in the building the *plumbing fixtures.* This was a separate and distinct contract. When the work was completed, Porter, at the request of Long, furnished him an itemized statement of the labor and materials furnished for the plumbing fixtures. This was furnished prior to the time Long made settlement with Case, who was *erecting the building,* and Case's contract was for erecting the building while Porter had the contract to put in the plumbing fixtures.

The defendants contend that Ralph Long, who was trading as the Chero-Cola Bottling Company, made a contract with S. E. Case, one of the defendants, to erect a building on his lot and install the *plumbing fixtures;* that Case had the entire contract and subcontracted with the plaintiff E. S. Porter to *put in the plumbing fixtures.* That Porter was a subcontractor. At the request of Long, Porter, as subcontractor, furnished him on 26 July, 1920, an itemized statement of the labor and materials used in doing the plumbing, and he did this as a subcontractor and under Case, and this was done prior to the time Long made settlement with Case, *the contractor,* for the building and plumbing fixtures. That Porter, *as subcontractor,* filed claim of lien on 3 January, 1921, in the clerk's office, which under the statute was a nullity. Suit was instituted on 28 February, 1921, more than six months after the giving of the notice of defendant Long. Under the law relating to subcontractors, to enforce the lien, suit must be commenced in six months—from 26 July, when he filed itemized statement with Long.

It is contended by defendant "that the plaintiff declared as principal contractor on a contract alleged to have been made with the defendants

Case, Mitchell, and Long, and that he does not allege that Case as principal contractor entered into a contract with Long to erect the building, and that Porter entered into a subcontract with Case to do the plumbing. That the plaintiff Porter and the defendant Case were partners in the construction of said building, including the plumbing, and had been paid in full, and plead the statute of limitations in that the plaintiffs did not institute their action within six months after the giving of the notice of the claim of the plaintiff E. S. Porter."

From the allegations of the complaint the plaintiffs sue on a contract made by E. S. Porter with S. E. Case and Ralph Long, trading as the Chero-Cola Bottling Company (voluntary nonsuit was taken as to Nicholas Mitchell), by the terms of which Porter was to furnish the labor and material and install the plumbing system in the building Ralph Long was having erected on his lot. The work was commenced on 7 January, 1920, and completed 29 July, 1920, and the cost of the labor and material was $3,360.37. There is no dispute about the work not being done in an efficient manner and the material not being all right.

The defendant denies this contract and alleges that the entire contract for building and plumbing fixtures was made by S. E. Case with Ralph Long (owner of the Chero-Cola Bottling Company). That plaintiff E. S. Porter was subcontractor and made the contract for plumbing, fixtures, etc., with S. E. Case, and that Case and Porter were partners, and Long paid Case in full, with knowledge and consent of Porter, and pleads estoppel. That the suit was not commenced within six months after notice was given by Porter to Long to enforce the lien in accordance with statute.

It is alleged by plaintiff E. S. Porter that the contract was made by him with Ralph Long (Chero-Cola Bottling Company) for the plumbing fixtures. The lien statute is as follows:

"C. S., 2433. Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished."

Relation of debtor and creditor must exist, and the lien depends on and is incident to debt. *Mfg. Co. v. Andrews,* 165 N. C., 285.

"There must be a contract, express or implied, under which materials were furnished or work done in order for the lien to exist." *Nicholson v. Nichols,* 115 N. C., 200; *Bruce v. Mining Co.,* 147 N. C., 642.

The place and time to file liens are as follows:

"C. S., 2469. All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the

peace; if over two hundred dollars or against any real estate or interest therein, in the office of the Superior Court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished."

"C. S., 2470. Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops."

Action to enforce lien is as follows:

"C. S., 2474. Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the Superior Court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due."

It appears from the record that the contract for the work and labor done and material furnished for the plumbing, etc., was completed on 29 July, 1920. The record shows:

"Notice of lien, *E. S. Porter v. Chero-Cola Bottling Company, S. E. Case, and Nicholas Mitchell,* filed in the office of the clerk of the Superior Court of Forsyth County, 3 January, 1921, at 2:45 o'clock p. m., and entered in the lien docket of said court on page ...., and duly indexed as required by law.

W. F. BYRD,
C. S. C. Forsyth County."

The lien filed in the clerk's office seems to be filed in accordance with the statute—the description of the land is definite. The claim in detail showing the time, the materials furnished, and labor performed. The land, after being described, is referred to by metes and bounds as "being the property conveyed by Glenn Wimbish to the Chero-Cola Bottling Company, recorded in Book of Deeds 175, p. 158, in the office of the register of deeds of Forsyth County, N. C., upon which property is situate a two-story, concrete and tile bottling plant, upon which said labor and material was furnished." The notice further states:

"The labor and material on account of which this lien is claimed and filed were furnished and performed to and for said Chero-Cola Bottling

Company by the said claimant in Forsyth County, N. C., under and pursuant to the terms of an agreement, the same being an entire and indivisible contract made and entered into by the said claimant and the said S. E. Case, Nicholas Mitchell, and Ralph Long, manager of Chero-Cola Bottling Company, in Winston-Salem, N. C., on or about 1 January, 1920."

Plaintiffs introduced the following from the amended answer of the defendants, Ralph Long and others:

"The defendants, Ralph Long, trading as Chero-Cola Bottling Company, and the Piedmont Chero-Cola Bottling Company, answering the complaint of the plaintiffs, allege:

"It is alleged that Chero-Cola Bottling Company is a trade name formerly used by one Ralph Long, who is a defendant in an action now pending in the Superior Court of Forsyth County entitled, *'E. S. Porter and Seaboard Supply Company v. Ralph Long,'* and it is alleged that the causes of action set up in favor of said plaintiffs are the same."

Plaintiffs introduced the original summons, issued 28 February, 1921; served 10 March, 1921.

S. E. Case is insolvent. The plaintiff seeks to obtain judgment for the debt against Ralph Long and enforce the lien on the property now owned by the defendant Piedmont Chero-Cola Bottling Company, a corporation, Ralph Long having deeded the property to this corporation on 28 September, 1920.

If the relationship of debtor and creditor exists between Porter and Long, then the lien filed in the clerk's office on 3 January, 1921, by Porter against Long and others, for labor and material furnished and contract completed 29 July, 1920, is within the statutory period of six months, and the suit started to enforce the lien by Porter against Long on 28 February, 1921, was within the statutory period of six months. Now the question arises if this relationship of debtor and creditor exists, is this a lien on the property of defendant Piedmont Chero-Cola Bottling Company, sold to it by Ralph Long on 28 September, 1920?

In *McAdams v. Trust Co.*, 167 N. C., 496, it is said: "Construing our statute on liens of mechanics and laborers, this Court held in *Burr v. Maultsby*, 99 N. C., 263, that the lien relates back to the time the work was commenced or the materials were furnished, and does not impair or affect encumbrances existing prior to that time, but only those subsequently created."

It will be noted that the suit was commenced by E. S. Porter against Ralph Long, S. E. Case, and Nicholas Mitchell, and by issuance of summons on 28 February, 1921, complaint and amended complaint were duly filed against these defendants. The allegations in the complaint are that the relation of debtor and creditor existed. Judgment

prayed against all the defendants and the "lien be foreclosed" and the premises sold. The original complaint was filed 29 April, 1921. The notice and claim of lien filed did not name the property as being that of Ralph Long, who was sued, but the property of the "Chero-Cola Bottling Company," afterwards made a party. It describes the property and refers to it as the property deeded to Chero-Cola Bottling Company by Glenn Wimbish. It further refers to Ralph Long as being the manager of the Chero-Cola Bottling Company. From the record, undisputed, the Chero-Cola Bottling Company was Ralph Long. The deed to the property was made to the Chero-Cola Bottling Company; Long had to sign the deed to the Piedmont Chero-Cola Bottling Company.

We think, under the facts and circumstances of this case, that the notice and claim of lien filed 3 January, 1921, was sufficient. The plaintiff began to perform the labor and furnish material, commencing under contract of 7 January, 1920, and completed same 29 July, 1920. The Piedmont Chero-Cola Bottling Company, if a contract is found to exist, express or implied, between E. S. Porter and Ralph Long, took the deed from Long *cum onore,* subject to the lien of $3,360.37 and interest.

If the contention of the defendants are correct, that Porter was a subcontractor, then plaintiff was not bound under the law to file a lien *before the clerk.* S. E. Case had the entire contract *to build the building and to install the plumbing fixtures* for Ralph Long. The defendants plead the statute of limitations set out in C. S., ch. 49.

As to subcontractors, the following provisions apply:

"C. S., 2437. All subcontractors and laborers who are employed to furnish and who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given."

"C. S., 2438. Any subcontractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee refuses or neglects to retain out of the amount due the said contractor under the contract as much as is due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer

or material man may proceed to enforce his lien, and after notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided."

"C. S., 2439. When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided."

"C. S., 2440. Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes. Upon the delivery of such notice to such owner or his agent the person giving such notice is entitled to all the liens and benefits conferred by law in as full and ample a manner as though the statement was furnished by the contractor, architect or such other person. And after the notice herein provided is given, no payment to the contractor shall be a credit or a discharge of the lien herein provided."

"C. S., 2441. The sum due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the Superior Court."

"C. S., 2442. If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant."

"C. S., 2443. If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court."

Under the provisions relating to the rights of a subcontractor, under C. S., 2438, "he may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor. . . . Laborer or material man may proceed to enforce his lien after such notice is given," etc. No notice by the subcontractor need be filed before a justice of the peace or clerk as is required of contractor, but notice to owner creates the lien.

Under C. S., 2478, subsec. 4, this lien may be discharged: "By failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed."

The *lien* is lost by an action not being commenced within six months after notice by the subcontractor to the owner, but the statutory *right* to *sue* the *owner* is not barred. The owner under the statute is bound to account to the subcontractor for what he may owe the original contractor if notice is given before payment to contractor. C. S., 2438-2440-2442, *supra.*

This matter was recently discussed in *Campbell v. Hall, ante,* 464, and authorities cited.

As this case goes back for a new trial, we have tried as clearly as we could from the record, to set forth a consecutive statement of the points involved and to set out the statutes in full, which may save the profession some labor.

The only questions we think material on the record, from the allegations of the complaints and answers (without amendment), are:

Was there any evidence to go to the jury of a contract, express or implied, under which work was done and materials furnished by E. S. Porter to Ralph Long (Chero-Cola Bottling Company) for the plumbing fixtures?

Did the relation of debtor and creditor exist between these parties?

It is claimed by Porter that the *contract for the building* was given by Long to *S. E. Case* and the *plumbing* to *him.* That he was a plumber. The sign on his office was "E. S. Porter, Plumbing and Heating." S. E. Case & Co., of which he was a member, had nothing to do with this plumbing contract. We think there was sufficient evidence to be submitted to a jury. We will not set out the evidence, as the probative force is for the jury.

For the reasons given we think there was error in granting the nonsuit. There must be a

New trial.

MARGARET BLUM, EXECUTRIX, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 30 April, 1924.)

1. Negligence—Railroads—Grade Crossings—Signals—Evidence.

It is incumbent upon a railroad company, under the common law, unaided by statute, to give proper warnings of the approach of its trains by the timely sounding of the locomotive whistle and the continuous ringing of its bell at a public highway crossing at grade, commensurate with the dangerous condition existing there; and the question discussed by *Clark, C. J.*, as to whether the absence of an electric gong, automatically rung by the passing locomotive in advance of its approach, may also be received upon the issue of actionable negligence, in accordance with the finding of the jury as to whether the danger to life and limb would require it under the existence of the dangerous conditions as found by them under the evidence in this case.

2. Same—Contributory Negligence—Evidence.

Where the driver of an automobile was killed by the negligence of a railroad company at a grade crossing with a public highway, under conditions that would have rendered it impossible for him to have seen or apprehended the approach of the defendant's train before entering upon the track at the time of the collision, his failure to have stopped before attempting to cross the track will not bar the recovery of damages for his wrongful death, or affect the negative finding of the jury upon the issue of contributory negligence.

ADAMS, J., concurs in result. Concurring opinion by STACY, J.

APPEAL by defendants from *Harding, J.*, at October Term, 1923, of MECKLENBURG.

This action was brought to recover damages for the wrongful death of the husband of the testator, who was killed at a grade crossing over the tracks of the defendant, at Linwood, near noon, on 26 September, 1922. The automobile, in which he was riding with Mr. Robert J. Hayes, on the highway from Charlotte to Lexington, was struck by

defendant's train, running south an hour and ten minutes late, and at about 45 miles an hour, instantly killing them both as they came through an opening in a string of box cars stored on each side of the crossing and along a sidetrack immediately adjacent and parallel with the main-line track on which the train was running. These box cars cut off the view of the deceased and his companion of the train as it approached the crossing.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury, and answered in favor of the plaintiff, and her damages assessed in the sum of $32,000. From the judgment on the verdict the defendants appealed.

John M. Robinson and W. S. O'B. Robinson, Jr., for plaintiff.
O. F. Mason and F. M. Shannonhouse for defendants.

CLARK, C. J. The defendants rely upon the refusal of a nonsuit, errors in the admission of evidence and in the charge, and the refusal of the court to give certain instructions. The exception because of refusal to nonsuit requires no discussion.

The defendants excepted to the admission of evidence as to the use of gongs at other crossings. This Court has repeatedly said that, where there was a grade crossing, it was incumbent upon the defendant railroad company to give notice of the approach of its train by blowing the whistle or sounding the bell or ringing a gong, and, in proper circumstances, having a watchman to lower gates; which of these precautions should be taken being a matter of evidence upon the surroundings and the facts of the particular case. *Dudley v. R. R.*, 180 N. C., 36.

In many of our States, as in all other countries, the railroads have been required to be constructed without grade crossings; and where this was not done, in many States they have since been required to abolish them because of their interference with the right and safety of the public to use their own highways, which right is superior to that of eminent domain, by which railroads have been authorized to be operated for the public convenience and for profit to its owner, but in subordination to the rights of the public. Being useful to the public, they are held *quasi*-public corporations, but have been granted the right of eminent domain, to take private property for their use as right of way, subject to public regulation as to their conduct and charges.

In this State the Corporation Commission was authorized, in 1907, to require the abolition of all grade crossings of the public highways by railroad tracks wherever desirable (C. S., 1048), and this has been done, according to a recent report of the Highway Commission, in a great many cases. It had not been done, however, in this particular locality. Where it has not been done, there is recognition of the right of the

public to use its own roads with safety to life and limb from the operation of trains, by requiring fullest notice of the approach of a train by the engineer blowing a whistle and ringing a bell, and by installing electric gongs, where necessary, to warn travelers, and in all much-frequented places they have gates and custodians to keep them. *R. R. v. Goldsboro,* 155 N. C., 359, 363, approved on writ of error, 232 U. S., 548, and citing cases in Anno. Ed.

In Germany, for forty years, the approach of trains to railroad stations has been announced by electric gongs, operated automatically by the wheels of the engine making an electric circuit as it passes over a device located several hundred yards distant, which rings a gong over the annunciator in the station, giving notice as to what train is arriving, instead of by the human voice, as is usual here. The same device is often used by some railroads here, including defendants, to give warning at crossings, in addition to signals by whistle and bell. These matters have been often sustained by decisions in this Court.

In this State there are over 5,500 miles of railroad tracks, and very many times as large a mileage of roads owned by the public, over which latter there now pass constantly 250,000 automobiles and motor trucks licensed by the State, besides horse-drawn vehicles many times as numerous, and other conveyances of both kinds from other States. These carry an immense number of persons and a vast quantity of freight.

As vehicles pass along the public roads far more frequently than do trains along the tracks, it has always been held reasonable that the railroads should be required to give notice by signals and, where necessary, by gates or gongs, of the approach of one of their dangerous agencies, so that the traffic and travel by the public over their own public roads shall be protected from unnecessary dangers from railroad trains. The railroad companies are granted existence by legislation and are operated for private profit in this country, though, it is true, in all other countries, with rare exceptions, they are the property of the Government and operated like the postoffice or the army or navy, or, like our railroads were during the war, by the Government.

In this case the evidence comes largely from the defendants' own witnesses, and upon it the jury found that the death of the plaintiff's testator was caused by the negligence of the defendants, and that he was not guilty of contributory negligence.

The defendants' tracks at the point in question (Linwood) run practically north and south, and the intersecting highway, along which Mr. Blum and his companion were traveling eastward, ran practically east and west. There are three railroad tracks at that point over the crossing. The western one is a sidetrack, upon which the box cars were stored at the time of the accident. The second or middle track is the

main-line track, for southbound trains, upon which the train in question was running; and the third or eastern track is the main-line track for northbound trains. The distance between the center line of the sidetrack and the center line of the southbound track at this point is 13 feet. The crossing in question is known as the "depot crossing"; 790 feet to the north is the "Lexington crossing," and 1,917 feet north of the Lexington crossing is what the witnesses called the "farm road crossing." The station-blow post for the Linwood depot is 5,402 feet north of the depot crossing. The southbound whistle-post for the depot crossing is 1,429 feet north of the center of the crossing. The station-blow post for southbound trains, which this was, is around a curve in the track and is located in a slight cut. Further on, towards the station, from this blow-post, the cut gets deeper, up to an 18- or 20-foot cut, and at 300 feet from the station-blow post it is about a 15-foot cut. The grade of the railroad tracks from the station-blow post ascends for the first 3,500 feet, but from a point 2,300 feet north of the depot crossing it is down grade to the crossing and beyond.

Approaching the crossing on the highway from the west, going east, as the deceased was traveling, there are obstructions on the north or left-hand side of the highway, such as trees and buildings, so that, even if there had been no box cars banked along the sidetrack, persons approaching the crossing from the west, going east, could scarcely have seen a train approaching from the north, going south, as this train was. The right of way of the railroad is 100 feet on each side of the center line of the tracks, and the permanent obstructions referred to are, therefore, located partly on the right of way.

J. O. Lee, a witness for the defendants, who passed over the crossing shortly before the deceased and his companion, testified that the conditions existing at the crossing made it "a death-trap." Fourteen box cars were parked to the south of the crossing and forty-seven to the north, from which direction the train came, with a narrow opening left at the crossing, through which travelers were required to pass. The box cars extended 1,980 feet north of the depot, with another opening left in the line at the Lexington crossing. The accident happened Thursday, 26 September, 1922, and the box cars had been standing parked on each side of the crossing since the Saturday before.

Many witnesses, for both the plaintiff and defendants, agree that it was impossible for a traveler along the highway going east to have seen a southbound train until the front wheels of his automobile were on the southbound track, where it would be struck by that train.

According to the evidence, there were no precautions of any nature whatever for the protection of travelers at the crossing made by the defendants, notwithstanding that the crossing was a part of the public

highway and the principal public road in the village of Linwood, and had been a public highway for thirty years. According to the evidence, an automobile passed over this crossing every five or six minutes, day and night. About forty trains a day were operated over the crossing, many of them through trains, which did not stop at Linwood.

The answer admits that the train which killed the deceased was running forty to forty-five miles an hour, and was an hour and ten minutes late, by its schedule, and that box cars were stored along the sidetrack, on each side the crossing, as above stated. The great weight of the evidence is that this fast train—forty-five to fifty miles an hour—came down this long grade approaching the depot crossing, running alongside of the string of box cars stored on the sidetrack, without slackening its speed or giving any warning, by bell or whistle, of its approach, and struck and killed the deceased and his companion just as their automobile passed through the opening in the string of box cars, and reached the southbound track without giving them time or opportunity to see or hear the approaching train.

F. H. Bell, a witness for the defendant, standing on the depot platform, on the west side of the crossing, testified that he saw the train coming, and that in his judgment it was running as rapidly as he ever saw any train on this railroad; that it did not slacken its speed at all as it approached the crossing, and that, though he stood on the platform and saw it approach, he was not conscious of ever having heard it blow a whistle or ring a bell, and saw no other indication that the engineer knew he was approaching the crossing, and that it was impossible for the deceased to have seen the approach of the train until the front wheels of his automobile got on or near the first rail of the main line of the southbound track. It is admitted that the string of box cars parked to the north of the crossing completely hid the whistle-post for the crossing, so that, as the engineer came down the track towards the crossing, he could not see the whistle-post, which was located 6 or 7 feet on the west side of the string of box cars, and was not over 5 or 6 feet high.

The engineer, who was a witness for the defendants, said that he could not keep in mind how many whistle-posts there were on his run between Greensboro and Spencer, and that the only way he knew when and where to blow for a crossing was by seeing the whistle-post, and that he was guided by the whistle-posts in blowing for the road crossing. He further said that, if he should happen to miss one, he would not blow, for they were put there to direct the engineer when and how to blow the whistle. He said that the whistle-posts had two black stripes and two black dots, and the crossing signal was two long blasts and two short ones, and that the rules of the company required him to blow these signals for the stations and for the road crossings, and to keep his

bell ringing over all road crossings. This engineer further testified that, as he ran his train down the track, the box cars on the parallel sidetrack were so located that a man in an automobile could not see his train until he got directly on the track, and that he ran his train down grade across the Linwood crossing at such speed that he could not stop it inside of 250 yards; that he made no attempt to reduce the speed of his train as it crossed the Linwood crossing; that he was running under steam and did not cut the steam off going down the grade. He further testified that the front end of the pilot of his engine was within 6 or 8 feet of the automobile when he first saw it, and at that time the front wheels of the automobile were just across the first track as he saw the driver coming out in the gap between the line of cars, and his engine struck the automobile just as it came upon the track.

Mr. Fitzgerald, the postmaster at Linwood, another witness for the defendants, testified that he was at the postoffice, just west of the crossing, waiting to receive the mail, and was particularly interested to hear the train blow, and only heard it blow once, and did not know how far it was up the track. If this was the station blow (which was one blow), the station-blow post, according to the evidence, was a mile north of the crossing and around a curve, and hence gave no warning of the train's approach to travelers along the highway, who were at that time probably a third of a mile or more from the crossing. The rules of the company, according to the evidence, required two long blasts and two short blasts to be given at the whistle-post for the Linwood crossing, 1,429 feet north of the crossing, and also required the bell to be kept ringing as the train passed over the crossing. Fitzgerald testified that he did not hear any bell ring, and only heard one blow somewhere up the track, though he was particularly listening for the train, and that, on account of the buildings and trees on the north side of the highway as the railroad crossing is approached from the west, a man driving an automobile could not see this train going south, on account of the string of box cars and the buildings.

There were several other witnesses introduced by the defendants, who testified that they heard one long blow, some distance up the track, but that they heard the train give no signal or warning of its approach to the depot crossing, either by bell or whistle, though several swore that they listened after they heard the one blow far up the track.

Mr. Bell, the defendants' witness, testified that as the deceased and his companion approached the crossing they were driving about ten miles per hour; that if they had stopped at the crossing before proceeding across the track they could not have seen the approaching train.

Mr. Lee, a witness for the defendants, who immediately preceded the deceased over the crossing, testified that he stopped his car before cross-

ing, trying to get a view of the tracks, and was unable to do so; that the box cars entirely obstructed the view of the tracks.

In *Hinkle v. R. R.,* 109 N. C., 472, which was in regard to a crossing accident at Linwood, *Justice Avery* said: "It is negligence *per se,* because of the peril, both to passengers on trains and people using highways, to omit to give in reasonable time some signal from a train moving, whether at the rate of twenty or forty miles an hour, when it is hidden from the view of travelers who may be approaching and in danger of coming in collision with it, by the cars of the company left standing on the track," citing numerous cases. And "Where a railroad company has erected a whistle-post at a proper distance from a crossing in order to notify engineers when to give timely warning of the approach of a train to persons using the intersecting highway, and the purpose of the company is known to the public, so that persons generally are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company if the engineer failed to sound the whistle at the point so indicated in passing with a freight or passenger train in his charge." This has been approved by the courts at least thirty times and as late as *Jackson v. R. R.,* 181 N. C., 153.

The fact that the omission to give notice by a blast of the whistle or the ringing of a bell, or both, is negligence, and that it cannot be said to be contributory negligence as a legal conclusion if the failure to stop was caused by the breach of duty of the defendant in failing to give such notice by bell or whistle, is clearly stated in an elaborate opinion by *Allen, J.,* in *Perry v. R. R.,* 180 N. C., 298, in which it is said: "Notice by bell or whistle is required, because the noise of the train, which is always present, is not an efficient protection to life and property, and when the defendant has by its negligence permitted obstructions on its right of way, so that the traveler cannot see, and has failed to give the proper signal, which he has a right to expect, as a train approaches, the defendant ought not to be absolved from the consequences of its negligence, because the traveler, relying upon the performance of duty by defendant, might have heard the noise of the train if he had stopped." There was evidence fairly submitted to the jury to justify their finding the above state of facts, and the charge is almost in the exact language of the Court in *Perry v. R. R., supra,* which followed the previous decisions in *Goff v. R. R.,* 179 N. C., 216; *Shepard v. R. R.,* 166 N. C., 544; *Jenkins v. R. R.,* 155 N. C., 203; *Hinkle v. R. R.,* 109 N. C., 472.

After a careful examination of the exceptions to the evidence and the charge, we think this case was fairly and fully presented to the consideration of the jury, and that their verdict is untainted by any error of the court, either in the evidence or in the charge.

The defendants, in the absence of other ground, stress greatly their exception to the admission of evidence that automatic electric railroad gongs, to give notice of the approach of trains at a crossing, were used at other crossings on this railroad, and, indeed, at two other crossings in this county. Such gongs are a well-known appliance, often used for the purpose of giving warning to travelers at a crossing of an approaching train, and their use as a safety device at crossings was well known to the defendants, and witnesses testified to their efficiency. Witnesses testified that this railroad had automatic gongs at several other crossings—one at Reidsville, one between Greensboro and Pomona, and one at Danville—and that these gongs were placed at the highway crossings to warn the public, so that one driving an automobile could hear them far enough away to keep from getting on the track. But it is needless to discuss this matter further, for, at the request of the defendant, the court withdrew this evidence from the consideration of the jury. The court instructed the jury as follows: "There is no statute or other law of this State requiring railroad companies to install or maintain bells, gongs, gates, or watchmen at railroad crossing to warn travelers on the public road, and the court charges the jury that the defendants in this case were not negligent in not having or maintaining an automatic or other bell, gong, gate, or watchman at the crossing at which the plaintiff's testator was killed; that the law prescribes the duties of the defendants; and, therefore, if, out of extra precaution, they maintain automatic bells or gongs at other road crossings, such action on their part would not impose on them any duty to maintain such a device at the crossing where Mr. Blum was killed; and the jury are instructed not to consider the absence of such a device in passing on the question whether the defendants were negligent on the question of the proximate cause of the death of plaintiff's testator."

This instruction was given at the prayer of the defendant, and he cannot complain. There was error against the plaintiff in giving this instruction that the jury should not consider it negligence that the defendants did not maintain automatic gong or other safety device at the crossing in question, and instructing them not to consider the absence of such a gong or other safety device in passing upon the first issue. This was a matter for the jury upon the evidence.

In *Dudley v. R. R.,* 180 N. C., 34, this Court said: "It was not error for the court to permit the plaintiffs to offer evidence that there was no automatic alarm or gates at the crossing, and the court properly left it to the jury to say, upon all the attendant circumstances, whether the railroad company was negligent in not erecting gates. It was incumbent upon the defendant to take such reasonable precautions as were necessary to the safety of travelers at public crossings. 22 R. C. L., 988.

This was a question of fact for the jury. That the city authorities assented that a watchman should be stationed at the crossing was not conclusive upon the plaintiffs if, in the opinion of the jury upon the evidence, this was not sufficient protection to the public."

To the same effect as the *Dudley case,* we refer to the authorities heretofore cited, particularly 22 R. C. L., 990.

The court's instructions to the jury that, as a matter of law, the defendants were not negligent in not maintaining an automatic gong or other safety device at the crossing, and that they could not consider the absence of such a gong or other safety device in passing on the first issue, are in direct conflict with the law as declared in the *Dudley case* and with the very great weight of authority in other jurisdictions; and this, notwithstanding the undisputed evidence as to the dangerous character of the crossing and its almost constant use as a public highway.

The trial court evidently so charged, out of abundant caution. It is true, there is no statute in this State requiring railroad companies to install automatic gongs or maintain gates or keep watchmen at crossings, but, as this Court has said, in *Dudley v. R. R., supra,* the absence of such statutory directions does not relieve the railroad companies of the obligation to exercise reasonable care for the safety of travelers at crossings. No statute requires railroad companies to give warning of the approach of a train to a crossing, by bell or whistle, but the duty to do so arises by virtue of the common law, and is but an incident of the duty imposed upon railroad companies in running their trains over public highways to take all reasonable precautions for the safety of travelers using such highways. The duty includes the obligation to maintain such safeguards as common prudence would direct, and the jury could consider (if the court had not withdrawn it) that these electric gongs were in use by the defendants at other stations and crossings.

Where the statute requires the use of certain safety devices for the protection of passengers, employees, or the public, the failure to install them is negligence, as a matter of law; but where they are not prescribed by statute, the failure to use a given safeguard can be submitted to the jury as a fact upon the issue of negligence.

In *Greenlee v. R. R.,* 122 N. C., 977, there had been no statute requiring a railroad to equip its freight cars with modern self-coupling devices, but this Court held that it was negligence *per se* not to do so, in view of the large number annually killed or wounded by failure to do this. And this was followed and approved in *Troxler v. R. R.,* 124 N. C., 189, holding that the failure to furnish such safety appliances was culpable, continuing negligence on the part of the employers, which cut off the defense of contributory negligence and the negligence of a fellow-servant,

and of assumption of risk, and these decisions have since been made statutory, and the same principle has been applied to other machinery. It is not necessary, therefore, that the adoption of a safety appliance should be required by statute before its absence shall become evidence of negligence to be submitted to a jury.

In this case, there being evidence that an automatic gong was in use by defendants as a safety device at other highway crossings to give notice to travelers in time to prevent their attempting a crossing, it became a question of fact for the jury to say whether the defendants were negligent in not maintaining such an automatic gong at this crossing, at which plaintiff's testator was killed, especially in view of evidence as to the very dangerous character of the crossing.

In *R. R. v. Dandridge,* 171 Fed., 74 (U. S. C. C. A.), the Court said: "The third assignment presents the question of error in the trial court's allowing plaintiff to testify to the absence of a gateman or electric bells at the crossing, because neither were required by statute. Manifestly, the nonexistence of such a statute did not forbid the asking of the question and the answer to the same, as common prudence on the part of the company might have required such safeguards, in the absence of statutory regulations. *R. R. v. Ives,* 144 U. S., 419-421."

In *R. R. v. Wiggins* (Texas), 161 S. W., 445, it is said: "The settled rule in reference to the issue here raised is that, if a person of ordinary prudence would, under all the circumstances, have maintained a flagman or watchman at the crossing, where the plaintiff was injured, then the failure on the part of the railroad company to keep such flagman or watchman was negligence."

In *Annaker v. R. R.,* 81 Iowa, 267, it is said: "Whether such omission is negligence depends upon the circumstances, such as the frequency with which trains are passing, the amount of travel, the opportunities, or want of opportunities, for travelers observing the approach of trains, and the like."

Many additional authorities to the same effect, in our Reports and elsewhere, are to be found. The court having withdrawn this subject from the consideration of the jury, fuller discussion is not necessary. But, as said in *Dudley v. R. R., supra,* upon evidence that there were no automatic electric gongs or gates at this crossing, the court might properly have left it to the jury to say, upon all the attendant circumstances, whether the railroad company was not negligent in not providing such safeguards.

Upon careful examination, we find no error in the instructions to this matter, which is fully discussed in *R. R. v. Ives,* 144 U. S., 408, where it is said that the general rule is "well stated in *R. R. v. King,* 86 Ky., 589, as follows: 'The doctrine with reference to injuries to

those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate.'" It also quotes *R. R. v. Perkins,* 125 Ill., 127, where it was held that "the fact that a statute provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate. And in *Thompson v. R. R.,* 110 N. Y., 636, where it was held that giving the signals required by law by a railroad train approaching a street crossing does not, under all circumstances, render the railway company free from negligence," citing, also, *R. R. v. Commonwealth,* 13 Bush., 388; *Weber v. R. R.,* 58 N. Y., 451, and concludes as follows: "The reason for such ruling is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way. As a general rule, it may be said that, whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous, is a question of fact for the jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence," adding that where the crossing is a much-traveled one, and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard, by reason of the bustle and confusion incident to railway or other business, or by reason of some such like cause, a jury would be warranted in saying that the railway company should maintain these extra precautions at ordinary crossings in the country, citing numerous cases.

That case has been cited and approved on this point by numerous cases since, which hold that "a railroad is not excused for negligence by mere compliance with statute; it must take necessary precautions." 15 Rose's Notes, 1213, and cases there cited; and *R. R. v. Dandridge, supra,* and cases citing the same. Indeed, upon the evidence in this case, it would seem that the jury could have had no doubt, if the matter had not been withdrawn from their consideration, that if an automatic gong had been installed at this place it would have given such notice to the plaintiff's testator and his companion that it would have prevented this accident; at least, they would have been justified in drawing the inference that the failure to do so was negligence on the part of the defendants.

Neither do we find any error upon the issue as to contributory negligence, either in the instruction given or in those refused. There is no exception upon the third issue, as to damages, nor did defendants move that the verdict be set aside upon the ground that the damages awarded were excessive. Indeed, whether the damages in any case are inadequate

or excessive is a matter which rests solely in the sound judgment of the trial judge, and we have often held that this is not reviewable in this Court. *Benton v. Collins,* 125 N. C., 94; *Burns v. R. R., ibid.,* 306; *Gray v. Little,* 127 N. C., 306.

Upon the evidence, the plaintiff's testator, at the time of his death, was 47 years of age, an expert electrical engineer and a member of the American Institute of Electrical Engineers, earning more than $5,000 a year. The evidence was that he was a man of the most unusual industry and energy, and that his general character was excellent. Indeed, is was not contended in the court below that the damages awarded were excessive or even large, and it is not so contended in this Court.

After careful examination of all the exceptions, we find

No error.

ADAMS, J., concurs in result.

STACY, J., concurring: The record presents several serious exceptions; but, upon a careful investigation, it seems to me that they may be resolved in favor of the validity of the trial, without doing violence to any legal principle. For this reason, I concur in the result.

The question as to whether the trial court erred in charging the jury that "the defendants in this case were not negligent in not having or maintaining an automatic or other bell, gong, gate, or watchman at the crossing at which the plaintiff's testator was killed," because not required by statute, is not before us for decision. This instruction was given at the request of the defendants, and, of course, it forms the basis of no exception on the present record. The plaintiff alone could object to the instruction, and she is not appealing.

M. L. MATTHEWS AND SANFORD SASH & BLIND COMPANY v. JAMES LUMBER COMPANY.

(Filed 30 April, 1924.)

Fires—Trespass—Damages—Title—Vendor and Purchaser.

It is not required that the purchaser of land should have acquired at least the equitable title before the injury, to maintain his action against his vendor for negligently setting fire to the land, which trespass continued after he had acquired the title; and an instruction that he could not recover in his action unless he were at least the equitable owner at the time of the origin of the fire, is reversible error.

MATTHEWS *v.* LUMBER CO.

APPEAL by plaintiff, M. L. Matthews, from *Daniels, J.*, at September Term, 1923, of LEE.

Civil action to recover damages for an alleged negligent burning and injury to plaintiff's lands and timber.

From a verdict and judgment in favor of defendant, the plaintiff appeals, assigning errors.

Hoyle & Hoyle and Gavin & Jackson for plaintiff.
Little & Barnes for defendant.

STACY, J. It appears that at the time the plaintiff contracted to purchase the land in question, consisting of some 505 acres, more or less, the fire of which he complains was then out and had already burned over about ten acres of the sparsely timbered portion thereof, but the major part of the damages was sustained after the plaintiff became the equitable owner of the land. The trial court instructed the jury that the plaintiff could not recover unless he were at least the equitable owner of the land at the time the fire originated or when it was first put out by the negligent act of the defendant; and this upon the theory that "the law will not permit the plaintiff to buy a flaming lawsuit." In this we think there was error.

Where the trespass of the defendant is continuous in character, as it is here, and has not ceased at the time the plaintiff acquired the property, the latter may maintain an action for the injury which he sustains, even though the defendant began his wrongdoing prior to the conveyance of the property to the plaintiff. 26 R. C. L., 958; *Mull v. R. R.*, 175 N. C., 593; *Wheeler v. Tel. Co.*, 172 N. C., 9.

Speaking to a similar question in *Daniels v. R. R.*, 158 N. C., p. 428, *Allen, J.*, said: "The plaintiff, L. G. Daniels, may recover damages for trespass committed prior to 17 December, 1908, the date of his deed, and the improvement company may recover for trespass after that time." See, also, C. S., 446, which provides, among other things, that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract."

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

W. A. CORBETT v. J. R. HAWES, J. T. HOGGARD AND W. O. MILLS.

(Filed 30 April, 1924.)

Evidence—Declarations—Boundaries.

A distinction should be observed between hearsay evidence and evidence by reputation as to boundaries of land in dispute in an action, the latter applying only to ancient boundaries, and the former to declarations of deceased persons, as to boundaries of more recent origin, it being required as to both kinds of evidence of this character that the declarations come from a disinterested person, *ante litem motam*, and the death of the declarant who therefore is unable to be produced as a witness at the trial, and such declarations made after the controversy arose, not merely before suit was brought, when the declarant is not shown to be a disinterested person, is reversible error.

APPEAL from *Sinclair, J.*, at March Term, 1923, of PENDER.

C. E. McCullers and Weeks & Cox for the plaintiff.
Wright & Stevens and Bland & Bland for the defendants.

ADAMS, J. It is not necessary to consider all the exceptions on which the defendants rely for the reason that some of those embraced in the third assignment of error are sufficient ground for a new trial.

The plaintiff instituted the action to recover damages for an alleged trespass on his land. Both title and location were in issue. For the purpose of showing that the beginning corner was at A the surveyor, after objection, was permitted to testify what a colored man named Owen Hayes had told him about this corner. The plaintiff also testified that the corner had been shown him by Hayes, who then owned the adjoining land. He said, "I have been with Owen Hayes to the corner at A on the Simpson map three times, two before the suit and one since. . . . He told me that was the corner between him and Murphy and Mattie Mott (under whom the plaintiff claims), or the Timothy Gurganous tract of land, just a corner in his line, and showed me from A to B and from A to I. It adjoins his land from A to I, or he said it did. He did not take me to I, but did later before the survey." The witness testified further that he had since learned that there was a dispute between the parties—each side claiming the land—at the time these statements were made, and that Hayes died some time after the action was brought. There was other evidence tending to show that the dispute existed even at an earlier date.

This evidence was inadvertently admitted. There is a distinction between hearsay evidence and evidence by reputation. The latter is competent as to ancient boundaries; the former—declarations of deceased

persons—is competent as to boundaries of more recent origin; but as to both kinds of evidence certain rules have been established. In *Yow v. Hamilton,* 136 N. C., 357, it is said: "It may be further said concerning hearsay evidence of declarations as to boundaries that there are three prerequisites to the competency of such evidence: (1) that the declaration must come from a disinterested person; (2) the declarations must have been made *ante litem motam,* and (3) the person who made them must be deceased, so that he cannot be produced and heard in person as a witness." *Tripp v. Little,* 186 N. C., 215; *Hoge v. Lee,* 184 N. C., 44, 50; *Lumber Co. v. Triplett,* 151 N. C., 409; *Bullard v. Hollingsworth,* 140 N. C., 634; *Hartzog v. Hubbard,* 19 N. C., 241; *Dancy v. Sugg, ibid.,* 515; *Gervin v. Meredith,* 4 N. C., 439.

The testimony as to what Owen Hayes said does not meet these requirements. It does not appear that his declarations were made *ante litem motam,* that is, before the controversy arose and not merely before the suit was brought (*Rollins v. Wicker,* 154 N. C., 560); but on the contrary the evidence shows that a dispute had arisen between the parties some time before the declarations were made in the presence of the plaintiff. The evidence was therefore incompetent. Besides, it does not affirmatively appear that the declarant at that time was himself disinterested in the result of the litigation.

New trial.

ARMOUR FERTILIZER WORKS v. W. B. COX AND FANNIE COX, HIS WIFE.

(Filed 30 April, 1924.)

Instructions—Evidence—Directing Verdict—Appeal and Error.

In an action to recover upon certain notes, the due execution of which is not in dispute, given by defendants for fertilizer, the defendants offered in evidence a part of the complaint alleging that they owed the plaintiff the full amount of the notes sued on, but the defendants claimed a deduction on account of not having received a certain portion of the goods, etc.: *Held,* the evidence was susceptible of more than one deduction, and it was reversible error to plaintiff's prejudice for the judge to charge the jury, in effect, to allow defendants' claim for the credit, if they "believed the evidence."

APPEAL by plaintiff from *Stack, J.,* at November Term, 1923, of RICHMOND.

The following is the record of the instruction given the jury: "If you believe the evidence in this case, the court instructs you to answer this

issue, which is, 'In what amount, if any, are defendants indebted to the plaintiff,' to answer that issue the amount of the three notes sued on, with credits of $9.90, $39.25, and $76.16. Gentlemen of the jury, if you believe the evidence, you will answer it the amount of the notes subject to credits amounting to $132.31, and with your permission, I will write your answer here. If you don't believe the evidence, you will instruct me to answer it nothing. Shall I answer it or do you want to go to your room and consider it?

"By the Court: Now I instruct you again, if you believe the evidence in the case, to answer that issue yes, the amount of the three notes sued on, less a credit of $132.31. You can make a note of those figures if you want to. I have added $9.90, $39.25 and $76.16, being the amount of that ton of stuff he said he did not get, with the interest on that amount. Take the case and say how you find."

E. A. Harrell for appellant.
No counsel for defendant.

ADAMS, J. The plaintiff brought suit to recover the remainder alleged to be due on certain notes executed by the defendants for the purchase of fertilizer. The defendants admitted the execution and delivery of the notes but contended they had ordered two tons of soda and had received only one. W. B. Cox testified to this effect, and his Honor instructed the jury if they believed the evidence to return a verdict for the amount of the three notes sued on less a credit of $132.31. This credit included $76.16, the price of the soda which, according to the evidence of the defendants, they had not received. The evidence, however, was not all one way. The contract describes the fertilizer as "5 tons 8-3-3, 4 tons 8-2-2, 2 tons nitrate of soda, 2 tons kainit"; but the defendants offered in evidence the third paragraph of the complaint in which it was alleged that the plaintiff had sold and *delivered* to the defendants fourteen tons of fertilizer at the price of $549.79. Moreover, the defendants agreed to examine each bag of fertilizer immediately upon its receipt, to verify the weight, quantity, brand, and tag, and to give the plaintiff immediate notice of failure in either of these respects; and a witness for the plaintiff testified that the defendant W. B. Cox in repeated conversations had "never objected to anything respecting the transaction." The plaintiff contended that although the sale was made in 1921, the defendant's claim of a deficiency in the shipment was first made after the suit had been brought.

Under these circumstances the evidence was susceptible of more than one deduction, and it is fully established that where more than one inference may reasonably be drawn from the entire evidence it is improper

for the presiding judge to instruct the jury to return a verdict for either party "if they believe the evidence." *Cox v. R. R.*, 123 N. C., 604, 611; *Board of Education v. Makely*, 139 N. C., 31, 38; *Smith v. Holmes*, 167 N. C., 561; *S. v. Murphrey*, 186 N. C., 113; *S. v. Loftin, ibid.*, 205.

For the error assigned there must be a

New trial.

J. D. BROOKS v. J. F. WHITE AND J. L. WHITE.

(Filed 30 April, 1924.)

1. **Judgments—Pleadings—Actions—Joint Liability—Default — Several Defendants—Statutes.**

   Where action is brought, to recover for goods sold and delivered, against several defendants jointly, and the complaint has been duly served on them all, the plaintiff is entitled to judgment by default before the clerk against one or more of the defendants who have failed to answer or demur within the twenty days after service of the complaint. Subsections 3 and 11, section 1, chapter 92, Extra Session, Public Laws 1921.

2. **Same—Appeal—Courts—Jurisdiction.**

   Where the clerk of the court has entered judgment by default for the want of an answer against one or more of defendants in failing to file answer or demurrer, under the provisions of subsections 3 and 11, section 1, chapter 92, Extra Session 1921, the defendants against whom the judgment has been rendered may on appeal apply to the judge for an extension of time.

3. **Same—Waiver.**

   Where the plaintiff is entitled to judgment by default of pleadings in an action against several joint defendants, his taking a judgment against one or more of them is a waiver of his right to such judgment against the others.

4. **Same—Default and Inquiry—Appeal and Error.**

   C. S., 595, 596, 597, govern the taking of judgments by default for want of answer or demurrer, under the provisions of Public Laws, Extra Session 1921, subsecs. 3 and 11, sec. 1, ch. 92, and it is erroneous for the clerk to enter a judgment by default final when it appears from the complaint that the action is to recover upon an unpaid disputed balance of an open account for goods sold and delivered, it being only proper for a judgment by default and inquiry, the amount to be determined by the jury upon the evidence.

APPEAL by plaintiff from *Sinclair, J.*, at chambers, 27 March, 1924.

This was an action to recover the balance due on an account for goods sold and delivered. The defendants were sued jointly and a joint judg-

ment asked against them. The defendant J. L. White filed answer, 8 December, 1923, and the defendant J. F. White tendered his answer on 5 December, 1923. On 17 December, 1923, after notice to defendant J. F. White, the plaintiff moved for judgment before the clerk of the Superior Court of Granville. The clerk rendered judgment by default final against him. The plaintiff did not move for judgment against the defendant J. L. White. From the judgment of the clerk the defendant J. F. White appealed to the Superior Court, which reversed the judgment of the clerk, and the plaintiff appealed.

Hicks & Stem for plaintiff.
T. Lanier for defendants.

CLARK, C. J. The only point presented is whether the plaintiff was entitled to judgment by default final against the defendant J. F. White. The complaint was served on this defendant 7 November, 1923, and he did not attempt to file answer until 5 December—eight days after the expiration of the time for filing answer or demurrer.

Subsection 3, section 1 of chapter 92, Laws Extra Session 1921, is as follows: "The answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint upon each of the defendants, or within twenty days after the final determination of the motion to remove as a matter of right. If the time is extended for filing the complaint, then the defendant shall have twenty days after the final day fixed for such extension in which to file the answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond the twenty days after such service)."

Subsection 11 of said section 1, chapter 92, *supra,* is as follows: "If the plaintiff or plaintiffs shall cause a copy of the complaint to be served upon any other defendants, either at the time of issuing summons or thereafter, the judgment shall be entered by the clerk as to the defendants served on first or third Monday next after the expiration of the time to answer."

In this case, counsel who represented the defendant J. L. White, by agreement with the counsel for plaintiff, obtained an extension of time, who therefore did not move for judgment against such defendant.

The other defendant, J. F. White, might have applied to the judge for an extension of time to answer, as authorized by subsection 18 of said chapter, but did not do so. The plaintiff was therefore entitled to judgment by default against him. *Lerch v. McKinne,* 186 N. C., 244, which has been reaffirmed in the more recent case of *Battle v. Mercer, ante,* 437. The defendant J. F. White contended that the plaintiff

was not entitled to judgment against one of the defendants, since the plaintiff did not move for judgment against both; but subsection 11 of said section 1, chapter 92, *supra,* provides: "If the plaintiff shall cause copy of the complaint to be served upon *any of the defendants,* . . . the judgment shall be entered by the clerk *as to the defendants served.*"

The fact that the plaintiff did not move for judgment against the other defendant, J. L. White, amounted to nothing more than a waiver as to him of the fact that his answer was not filed in time. *Cahoon v. Everton, ante,* 373.

By the terms of the statute above quoted, all default judgments are governed by C. S., 595, 596, and 597. In *Jeffries v. Aaron,* 120 N. C., 169, the Court held: "In an action upon an implied contract for goods sold and delivered, or in an action upon an open account, judgment should be by default and inquiry, and not final." And by section 9 of the above act it is provided that where the clerk renders judgment by default and inquiry, it is his duty to transfer the cause to the Superior Court in term-time for such inquiry to be made by the jury. The clerk was of opinion that this was an action upon an account stated, but upon the allegations in the complaint it was an open account, upon which the defendant had paid, when it was presented, so much as he admitted, and had denied liability for the balance of the account. It could only have become an account stated by his admission of liability, or by its receipt and failure to deny liability for a reasonable time. *Hawkins v. Long,* 74 N. C., 781; *Copland v. Tel. Co.,* 136 N. C., 13; *Blanchard v. Peanut Co.,* 182 N. C., 23.

It follows that the judgment by default final by the clerk was erroneous. At the most, he should have entered a judgment by default and inquiry, and the case should then have been transferred to the Superior Court to execute the inquiry. The judge, therefore, properly reversed the judgment of the clerk, and his judgment is

Affirmed.

STATE v. WALTER OXENDINE, CLARENCE OXENDINE, DOCK WILKINS, AND PROCTOR LOCKLEAR.

(Filed 30 April, 1924.)

1. Criminal Law—Homicide—Intent—Evidence—Accident.

Where two or more conspire together and are the aggressors in a resulting fight with firearms, and in consequence their adversary unintentionally kills an innocent bystander, his antagonists are not responsible for the killing, and cannot be lawfully convicted of the homicide, as there was no concerted action by them in that respect.

2. Criminal Law—Secret Assault—Statutes—Instructions—Appeal and Error.

While it is not required for the conviction of a secret assault, under the provisions of C. S., 4213, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error.

3. Criminal Law—Forcible Trespass—Evidence.

Where there is evidence that the defendant, indicted with others for forcible trespass, was present and acting in concert with another, who forced his way into a dwelling and took by force an occupant therefrom, and thereafter helped force him into the yard, he is guilty of the offense charged in unlawfully invading the possession of another by being present and violently assisting with a strong hand.

APPEAL by Walter Oxendine from *Long, J.,* at November Special Term, 1923, of ROBESON.

Criminal prosecutions, tried upon three indictments. All three of the cases having grown out of the same transaction and occurring at the same time and place, on motion of the solicitor, they were consolidated and tried before the same jury, the defendants not objecting.

1. In the first bill, Dock Wilkins, Clarence Oxendine, and Walter Oxendine were charged with a forcible entry and detainer upon the premises of one Donnie Locklear. On this bill there was a general verdict of "guilty" as to all the defendants.

2. In the second bill, Walter Oxendine, Clarence Oxendine, and Dock Wilkins were charged with a secret assault upon Proctor Locklear. On this bill there was a general verdict of "guilty" as to all the defendants.

3. In the third bill, Dock Wilkins, Walter Oxendine, Clarence Oxendine, and Proctor Locklear were charged with murdering one Robert Wilkins. On this bill there was a general verdict of "guilty of manslaughter" as to all the defendants.

All of the defendants were sentenced in each of the three cases. Walter Oxendine alone appeals. He was ordered to be confined in the common jail of Robeson County and assigned to work upon the public roads for a term of four years for manslaughter, twelve months for forcible trespass, and twelve months for secret assault, each of the last two sentences to begin at the expiration of the preceding one, making a total of six years on the three indictments. From these judgments the defendant Walter Oxendine appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Britt & Britt and McKinnon, Fuller & McKinnon for appellant.

STACY, J. A brief statement of the facts is necessary to a proper understanding of the legal questions presented by the appeal.

There was evidence offered by the State tending to show that on Christmas night, 25 December, 1922, Proctor Locklear, Zack Brooks, and Bert Locklear called at the house of Donnie Locklear to pay Donnie and her three daughters a social visit. While there—about 8 or 9 o'clock in the evening—they heard Walter Oxendine, Clarence Oxendine, and Dock Wilkins coming down the road, singing, hollering and cursing loud enough to be heard a distance of approximately forty yards away. These parties stopped in front of Donnie Locklear's house and stood there for a few minutes, talking with each other in low tones. The inmates of the house recognized them by their voices. Presently, Dock Wilkins, who was under the influence of strong drink, and cursing quite boisterously, rushed against the door and pushed it open, went inside, and pulled Proctor Locklear out into the yard and around the house. Walter and Clarence Oxendine did not go into the house, but they followed Dock Wilkins, after he had come out of the house, and assisted him in taking Proctor Locklear into the back yard. There was testimony that some one of the three exclaimed, with a number of oaths and epithets, "He is the man we are after; kill him!"

The other persons who were in the house at the time made a hasty exit, and were on their way to Bert Locklear's home, some 200 yards away, when shots were heard in Donnie Locklear's back yard.

In the meantime, Robert Wilkins, who had not been in Donnie Locklear's house at any time during the evening, and whose presence in the neighborhood was apparently unknown to every one, walked around the house and into the back yard to see what all the trouble was about. He had a shotgun on his shoulder, and Clarence Oxendine tried to take it away from him. While Robert Wilkins and Clarence Oxendine were tussling over the shotgun, Walter Oxendine and Proctor Locklear began shooting at each other with pistols. Walter Oxendine fired one shot, and Proctor Locklear two. One of the shots fired by Proctor Locklear struck Robert Wilkins and killed him.

The defendants, on the other hand, tell quite a different story. Their testimony is to the effect that they were out "holieving" on Christmas night, going from place to place, turning out people's stock, putting wagons on their porches, etc., which, they contend, is a custom of Christmas celebration among the Cherokee Indians of Robeson County. When they came to the home of Donnie Locklear, Dock Wilkins, who was drinking quite heavily, rushed against the door, pushed it open and went on the inside. In a few minutes he and Proctor Locklear came out of the house and they all engaged in a tussle, but without any ill-will towards Proctor, as they had nothing against him and did not even

know beforehand that he was in the county, he being a resident of Hoke County and only visiting in the community.

While they were tussling in the yard, Walter Oxendine fired his pistol into the ground and Proctor Locklear ran away and across the field, but no effort was made to shoot him or to follow him. Thereafter, Walter and Clarence Oxendine, Dock Wilkins and Robert Wilkins, who came up about that time, all walked down the road together and Walter told Dock he had not acted properly at Donnie's house and that he should go back and apologize. Dock was too drunk to apologize and so Robert Wilkins said he would go back and make amends for him. This he started to do. Robert Wilkins had not been gone but a few minutes when two pistol reports were heard and Robert began shouting and exclaiming, "Proctor Locklear has shot me." At least 10 or 15 minutes had elapsed between the time when they left the house and Robert Wilkins returned to apologize for Dock's conduct.

As bearing upon the indictment for murder, the court, among other things, charged the jury as follows:

"If the evidence satisfies you beyond a reasonable doubt that the defendants, Walter and Clarence Oxendine and Dock Wilkins, provoked the difficulty and are responsible for the fight that ensued, and that Proctor Locklear was not at fault, and that the deceased walked up while the fight was in progress, but did not participate in the same, and was struck by a stray bullet and suffered wounds from which he afterwards died, then under such circumstances the court charges you that the defendants, Clarence Oxendine, Walter Oxendine and Dock Wilkins, would be guilty of manslaughter and it would be your duty to so find."

The defendants except to this instruction and assign same as error. We think the exception is well taken and must be sustained.

It is unquestionably the law that where two or more persons conspire or confederate together or among themselves to commit a felony, each is criminally responsible for every crime committed by his coconspirators in furtherance of the original conspiracy, and which naturally or reasonably might have been anticipated as a result therefrom. And in the instant case, if the deceased had been killed by a shot from Walter Oxendine's pistol, each and every one of his confederates would have been equally responsible with him for the homicide. But Walter Oxendine and Proctor Locklear were not acting in concert; they were adversaries; and it is the general rule of law that a person may not be held criminally responsible for a killing unless the homicide were either actually or constructively committed by him; and in order to be his act, it must be committed by his own hand, or by some one acting in concert with him, or in furtherance of a common design or purpose.

As said in *Butler v. The People,* 125 Ill., 641: "Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design or in prosecution of the common purpose for which the parties were assembled or conspired together."

Suppose, instead of killing an innocent bystander, Proctor Locklear had killed Dock Wilkins, one of his assailants, would the law, under these circumstances, hold the surviving assailants or confederates of Dock Wilkins criminally responsible for the homicide? We think not. Each took his own chance of being injured or killed by Proctor Locklear when the three made a common assault upon him. They would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct; but they never advised, encouraged or assented to the acts of Proctor Locklear, nor did they combine with him to do any unlawful act, nor did they, in any manner, assent to anything he did, and hence they could not be responsible for his conduct towards the deceased. *Com. v. Moore,* 88 S. W. (Ky.), 1085.

In the case of *Com. v. Campbell,* 7 Allen, 541, a number of persons had conspired to create a tumult or riot, and in quelling it the officers by accident killed an innocent bystander. In a learned opinion, the Supreme Judicial Court of Massachusetts held that the rioters or conspirators were not guilty of murder; and, in the argument, used the following illustration: "Suppose, for example, a burglar attempts to break into a dwelling-house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent; nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not therefore have contemplated or intended it."

For the error, as indicated, the appealing defendant is entitled to a new trial on the charge of culpable homicide.

The cases of *S. v. Sisk,* 185 N. C., 696, *S. v. Dalton,* 178 N. C., 779, and *S. v. Lilliston,* 141 N. C., 857, in no way conflict with our present position.

Touching the indictment for secret assault, his Honor instructed the jury as follows:

"Now what is the truth of the matter, reviewing all the evidence, the evidence of the State and the evidence of the defendants, are you satisfied and beyond a reasonable doubt that they committed an assault upon Locklear and with intent to kill him? If you are satisfied of this and beyond a reasonable doubt, you will convict; otherwise, you will acquit.

However, if you fail to find that they committed an assault and in a secret manner or by waylaying Proctor Locklear, nevertheless if you find that they did assault him and with intent to kill him, why you will find such of them as you find did this with intent to kill him, you will find them guilty."

We think this instruction must be held for error on defendant's exception. The language of the statute is that if any person shall, in a secret manner, maliciously commit an assault and battery, with any deadly weapon, upon another, by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony, etc. C. S., 4213. It is not essential to a conviction for a secret assault, under the statute as now written, that the person assaulted should be unconscious of the presence of his adversary; but his purpose must not be known, for in that event the assault would not have been committed in a secret manner. *S. v. Bridges,* 178 N. C., 733. It will be observed that under the instruction excepted to the element of "in a secret manner, by waylaying or otherwise," was eliminated from the charge. This, no doubt, was an inadvertence, his Honor probably thinking for the moment that the defendant was indicted for an assault with a deadly weapon with intent to kill, resulting in serious injury, as condemned by C. S., 4214.

It follows that the appealing defendant must be awarded a new trial on the charge of secret assault.

The record discloses no error committed on the trial in regard to the charge of forcible trespass. The offense of forcible trespass is defined in some of the cases to be the unlawful invasion of the possession of another, he being present, violently or with a strong hand. *S. v. Tolever,* 27 N. C., 452; *S. v. McCauless,* 31 N. C., 375; *S. v. Laney,* 87 N. C., 535. The high-handed manner of the invasion may be by a multitude of people or with weapons. *S. v. Ray,* 32 N. C., 29; *S. v. Armfield,* 27 N. C., 207; *S. v. McAdden,* 71 N. C., 207; *S. v. Barefoot,* 89 N. C., 565. The force is sufficient if the party in possession must yield to avoid a breach of the peace. *S. v. Pollok,* 26 N. C., 305. All the elements necessary to constitute the offense of forcible trespass are present in the instant case, and we have found no ruling or action on the part of the trial court which we apprehend should be held for reversible error in regard to this charge.

On the charge of forcible trespass

No error.

On the charges of secret assault and culpable homicide

New trial.

MRS. SUSAN M. SHELTON AND WACHOVIA BANK & TRUST COMPANY, TRUST AGENT, v. W. H. CLINARD.

(Filed 30 April, 1924.)

1. Ejectment—Landlord and Tenant—Parties—Leases—Statutes.

The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. C. S., 2365, 2367.

2. Same—Title.

During the continuance of his possession entered upon and in right of the title of his landlord, the tenant is not ordinarily permitted to deny the title under which he had acquired possession, or set up a superior right or title in another.

3. Same—Duty of Landlord.

Where the landlord has leased the premises to another to begin at the expiration of an existing lease, he impliedly obligates the delivery of the possession at the time stated, and to see that the leased premises is then vacated for the occupation by his lessee.

APPEAL by defendant from *Bryson, J.*, at February Term, 1924, of FORSYTH.

Summary proceeding in ejectment, tried upon the following issues:

"1. Was the defendant the tenant of the plaintiff, and if so, did he hold after the expiration of the tenancy? Answer: Yes.

"2. What amount, if any, is the defendant indebted to the plaintiff for rent per month for the premises, and what amount is the defendant indebted to the plaintiff for damages? Answer: Rent, $250 per month."

From a judgment on the verdict in favor of plaintiff, the defendant appeals.

Oscar O. Efird and W. L. Ferrell for plaintiff.
Holton & Holton and W. T. Wilson for defendant.

STACY, J. This was a summary proceeding in ejectment, commenced in the court of a justice of the peace, and tried *de novo* on appeal to the Superior Court of Forsyth County. From the judgment of the latter court, the case comes to us for review.

The tenancy, the expiration of the term, and demand for surrender are all admitted, or at least they are not denied. But the defendant refuses to vacate the premises upon the ground that the plaintiff, the owner of the land, is not the proper party to bring this suit because

she has agreed in writing to lease the premises to D. T. Stathos, Steve Demetrion and Jim Malenkos for a term of five years, at and for the rental price of $250 per month, said lease to take effect on 1 December, 1923, the day after the expiration of the defendant's lease. Hence it is the contention of the defendant that said lessees, transferees of the right of possession, are the real parties in interest and alone entitled to institute a proceeding like the present.

Section 2365 of the Consolidated Statutes authorizes a summary proceeding in ejectment against any tenant, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, after demand for its surrender, and without the permission of the landlord; and section 2367 provides that the application for such remedy may be made by the landlord or lessor of the demised premises, or by his assigns, or his or their agent or attorney. We think the plaintiff comes precisely within the terms of the statute and is, therefore, entitled to avail herself of its provisions.

It has generally been supposed that a landlord can maintain a summary proceeding in ejectment to remove a tenant holding over after the expiration of his term, although the landlord may have entered into a new lease of the premises to begin immediately upon the expiration of the term of the tenant in possession; and it may be doubted as to whether the tenant under the new lease can maintain a summary proceeding in ejectment (not general action for possession) against the prior tenant because the statute apparently provides for such right only in cases where the conventional relation of landlord and tenant exists. However, as to this latter point, we make no present decision. The question is not before us. *Sloan v. Hart,* 150 N. C., 269.

Again, it has been the uniform holding with us that where the relation of landlord and tenant exists, and the latter takes possession of the demised premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord during the continuance of such tenancy, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person. *Hobby v. Freeman,* 183 N. C., 240; *Clapp v. Coble,* 21 N. C., 177. The reasons in support of the wisdom of such a policy are fully set forth by *Hoke, J.,* in *Lawrence v. Eller,* 169 N. C., 211, where the question is discussed at some length with citation of a number of authorities.

Speaking to the question in *Davis v. Davis,* 83 N. C., 71, *Smith, C. J.,* said:

"It is well-settled doctrine that one who, as tenant, gains possession of the land of another cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another

or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. 'Honesty forbids,' says *Ruffin, C. J.,* 'that he should obtain possession with that view, or after getting it, thus use it.' *Smart v. Smith,* 2 Dev., 258. 'Neither the tenant nor any one claiming under him,' remarks *Daniel, J.,* 'can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord.' *Callender v. Sherman,* 27 N. C., 711. 'If he entered as tenant, or after entry had become such,' is the language of *Rodman, J.,* 'he was estopped from asserting his title until he had restored the possession to the plaintiff.' *Heyer v. Beatty,* 76 N. C., 28."

This principle, however, in a number of jurisdictions, is subject to the exception that a tenant is not estopped from showing a conveyance of the demised premises by the landlord to another during the term of the tenancy (*Raines v. Hindman,* 136 Ga., 450; 24 Ann. Cas., 347, and note); and, with us, it does not go to the extent of denying to the tenant the right to dispute the derivative title of one claiming under the landlord. *Hargrove v. Cox,* 180 N. C., 360, and cases there cited; 16 R. C. L., 670. But an agreement on the part of the landlord to lease the demised premises to another, made during the term of the prior tenancy, is not such a "conveyance" as will deprive the landlord of the right to evict the tenant in possession, and thus make way for the entry of the new tenant.

Even in those jurisdictions holding that a tenant is not estopped from showing a conveyance of the demised premises by the landlord to another during the term of the tenancy, it is also held that a conditional sale of the leased premises does not terminate the relation of landlord and tenant, thereby denying to the lessor the right to institute possessory proceedings against the tenant holding over, since the landlord still retains the legal title. *Miller v. Levi,* 44 N. Y., 489. And upon summary action brought to recover possession of the premises, the lease under which the tenant holds having expired, the defendant cannot set up a lease from the plaintiff to a third party to commence at the expiration of his term. *Fox v. Macaulay,* 12 Upper Canada Common Pleas, 298.

In the last case just cited the following is taken from the syllabus: "Upon ejectment brought to recover possession of premises, the lease under which defendant held having expired, the defendant sought to set up a lease from plaintiff to a third party to commence at the expiration of his lease, contending that the lessee under that lease was entitled to possession: *Held,* that the defendant could not, as between himself and his landlord, set up the rights of a third party, but that he must give up possession, in accordance with the terms of his lease, to his landlord."

There is an implied obligation on the part of the lessor to deliver possession of the demised premises to the lessee at the commencement of the term. This implied obligation, where the term is to commence in the future, extends to the wrongful withholding of possession by a third person at the time of the commencement of the lessee's right to possession; so that, if a lease is made of lands then in the possession of another tenant of the lessor under an unexpired lease, it is the duty of the lessor to see that the first tenant vacates the premises at the time the second lessee's right of possession accrues. *Sloan v. Hart, supra.*

We think the right of the landlord to maintain this proceeding comes clearly within the terms of the statute. The judgment entered below must be upheld.

No error.

RICHMOND GUANO COMPANY v. FRANK C. WALSTON ET AL.

(Filed 7 May, 1924.)

1. Mortgages — Deeds of Trust — Statutes — Cancellation — Register of Deeds.

A statute will be construed to effectuate the legislative intent as gathered from its language, and to harmonize its various parts when this can reasonably be done; and *held*, that C. S., 2594, authorizing the register of deeds to cancel mortgages or other instruments by entry upon the margin of the registration book the word "satisfaction" upon exhibition to him of any mortgage, deed of trust or other instrument, accompanied by the bond or note, with the endorsement of payment and satisfaction by the payee, etc., does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money.

2. Same—Fraud—Innocent Parties.

Where the register of deeds has entered "satisfaction" of a deed of trust to secure borrowed money upon the margin of his registration book, upon the exhibition of the proper endorsement on the note and deed of trust by the payee, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the canceled instrument will not affect their rights when they were unaware thereof or had not participated in the fraud. C. S., 2594 (4).

3. Appeal and Error—Nonsuit—Voluntary Nonsuit—Estoppel.

Where the court has properly ordered an involuntary nonsuit as to some of the parties defendant, and thereupon the plaintiff has taken a voluntary nonsuit as to all, the plaintiff is concluded by his action from asserting error on appeal, for that he is entitled at least to judgment against those defendants as to whom he has taken his voluntary nonsuit.

APPEAL by plaintiff from *Daniels, J.*, at Spring Term, 1923, of NORTHAMPTON.

The material allegations of the complaint are as follows: On 22 February, 1921, Frank C. Walston, of Northampton, gave to Tomlinson & Company, Incorporated, of Wilson, his promissory note for $10,471.44, payable 15 November, 1921, to secure the payment of which he executed and delivered to D. M. Hill, trustee, of Wilson, a deed of trust on a tract of land containing 400 acres, situated in Northampton, and on certain personal property. The deed of trust was duly registered. Tomlinson & Company endorsed the note before maturity to the plaintiff, who took it without notice of any infirmity in the instrument or defect in the endorser's title. No part of the note has been paid, and the plaintiff is entitled to a foreclosure of the deed of trust. After this note had been endorsed to the plaintiff, Walston executed to Tomlinson & Company another note, purporting to be a duplicate of the first, in the sum of $10,471.44, which (the plaintiff alleges) was "spurious, forged, and pretended." The duplicate note and the deed of trust to Hill were receipted and marked paid by Tomlinson & Company, and thereafter were exhibited by Walston to S. J. Calvert, register of deeds of Northampton County, who marked the record and registration thereof canceled and satisfied. The plaintiff alleges that this cancellation was void, because procured by Walston and Tomlinson & Company with knowledge that the plaintiff was the holder in due course of the original note, and with intent fraudulently to hinder, delay and defeat the plaintiff in the collection of the amount due him. After the registration was canceled by the register of deeds, Walston gave to the Prudential Life Insurance Company of America a note for $9,500 for borrowed money, and secured it by a deed of trust to the Chickamauga Trust Company on the land described in the deed of trust to Hill; afterwards he executed another deed of trust on the same land to H. G. Connor, Jr., of Wilson, to secure his indebtedness to S. W. Anderson; and, further, on 12 April, 1921, he gave to Tomlinson & Company another note for $10,471.44 and secured it by another deed of trust on the same land to D. M. Hill. The Armour Fertilizer Works claimed to have certain rights in this note. It is alleged that the creditors and trustees had knowledge of the plaintiff's title. J. T. Cullipher is the owner of two judgments taken and duly docketed in Bertie and Northampton. Walston, Tomlinson & Company and Cullipher are insolvent.

The plaintiff contends that it is entitled to a judgment on its note, to have declared void the cancellation of the note to Tomlinson & Company and the deed of trust to Hill, and to have the property sold to satisfy the amount due on the endorsed note.

S. J. Calvert, register of deeds, denies the material allegations of the complaint, and alleges that on 8 April, 1921, Walston exhibited to him the original deed of trust to Hill, duly marked satisfied and the note described therein paid, and that he thereupon canceled the deed of trust.

The defendant Walston, admitting certain allegations and denying others, alleges that he has paid the note to Tomlinson & Company; that it has never been assigned by them to any one; that the duplicate note was executed at their request, because the original had been lost; that he was afterwards informed that the lost note had been found and destroyed, and that the note and deed of trust were delivered to him duly canceled. He says that he acted in good faith, without intent to defraud and without knowledge of the plaintiff's claim, and that the notes and deeds of trust which he subsequently executed were intended to secure his indebtedness as therein provided.

The other defendants filed answers putting in issue the plaintiff's alleged cause of action and setting out in detail the circumstances under which the several mortgages and deeds of trust were executed. They alleged that the cancellation of the note to Tomlinson & Company and of the deed of trust to Hill was valid; that they did not know of any irregularity or defect in it; that the Prudential Company lent the money and that it was applied in payment or part payment of prior mortgages and deeds of trust. It is not necessary to set out in detail the several answers of the defendants.

The plaintiff's evidence, if accepted as true, establishes the following facts: In June, 1920, the defendant Walston applied to the Chickamauga Loan and Trust Company for a loan of $12,000, to be evidenced by notes and secured by a mortgage or deed of trust on a tract of land. At that time there were two mortgages and two deeds of trust on this land, registered and outstanding against him. The money, when borrowed, was to be applied in payment or part payment of these encumbrances. On 22 February, 1921, Walston executed and delivered to Tomlinson & Company a note for $10,471.44, payable 15 November, which he secured by a deed of trust to D. M. Hill. At that time he told N. L. Finch, secretary and treasurer of Tomlinson & Company, that he had applied for the loan and it was agreed between him and Finch that this deed of trust should be withheld from registration until after the consummation of the loan. Meanwhile the deed of trust was recorded. The loan of $9,500, instead of $12,000, was agreed upon, the Prudential Company to furnish the money, and the attorney who had examined the title then notified Walston that, in order to get the loan, the deed of trust must be canceled. Walston informed Tomlinson & Company, and the secretary and treasurer directed E. H. Steger, an employee of the company, to cancel the deed of trust in the name of the corporation,

and, as the original note could not be found, to prepare another, have Walston to sign it, and then mark it paid. This was done, and the note and deed of trust bearing such endorsements were exhibited to the register of deeds, who thereupon canceled the registration in his office. Tomlinson & Company had assigned and endorsed the original note to the plaintiff, but the register did not know the note shown him was a copy. No one knew it, except Finch, Steger, and Walston. The Prudential Company made the loan, and the money was applied in part payment of Walston's prior indebtedness, which was secured, as stated, by mortgages and deeds of trust. A new deed of trust was given to Connor, trustee, and the deed of trust securing the Prudential Company's loan was filed as a first mortgage, the deed securing Anderson as a second lien, and a new deed of trust to Tomlinson & Company as a third lien.

At the conclusion of the evidence the Prudential Company, the Chickamauga Company, P. L. Woodard, S. W. Anderson, H. G. Connor, Jr., trustee, and Armour Fertilizer Works moved for judgment of nonsuit, and, upon his Honor's intimation that there was a failure of proof, the plaintiff submitted to a voluntary nonsuit as to all the defendants. Thereupon, the defendants Anderson, Woodard, and Connor, trustee, made a motion for judgment against their codefendant, Frank C. Walston on the cause of action set out in their answer as against the said defendant, and it was ordered, adjudged and decreed by the court:

1. That the plaintiff's action be dismissed and the plaintiff be taxed with the costs thereof.

2. That the defendants P. L. Woodard and S. W. Anderson recover of the defendant Frank C. Walston the sum of $3,779.79, with interest thereon from 14 March, 1921, together with their costs.

There was an order of foreclosure in case the judgment was not paid within ninety days, and following it appears this paragraph:

"The judgment herein rendered in favor of P. L. Woodard and S. W. Anderson and H. G. Connor, Jr., trustee, for $3,779.79, with interest, and the deed of trust securing the indebtedness, is hereby declared to be a second lien upon the property conveyed in the deed of trust, subject to the indebtedness of the Prudential Life Insurance Company of America for $9,500, with interest from 18 February, 1923, payable annually, secured in the deed of trust to the Chickamauga Trust Company, but prior, however, to the lien upon the said property created by the deed of trust to D. M. Hill, securing the indebtedness, held by the Armour Fertilizer Works, Inc., the order of the said lien being as follows, to wit: (1) Prudential Life Insurance Company, $9,500, with interest from 18 February, 1923; (2) P. L. Woodard and S. W. Anderson, $3,779.79; (3) Armour Fertilizer Works, Inc., $10,471.44, with interest from 12 April, 1921. And in the event of a sale of said prop-

erty the proceeds arising therefrom shall be applied as follows: First, to the payment of said indebtedness of the Prudential Life Insurance Company of America; secondly, any surplus to the payment of said indebtedness of Woodard and Anderson; and, thirdly, any surplus remaining to the said indebtedness of Armour Fertilizer Works, Inc."

The plaintiff excepted and appealed.

Bryce Little and Winston & Matthews for appellant.
H. G. Connor, Jr., and J. Crawford Biggs for appellees.

ADAMS, J., after stating the case: The plaintiff contends that it is an innocent purchaser for value of the original note executed by Walston and secured by the deed of trust, and that its title and interest should be protected against the cancellation of the registered security, which, it is alleged, was fraudulently procured. The defendants contend that, even if the cancellation of the deed of trust was procured by the false representation of Walston and Tomlinson & Company, the register of deeds had no knowledge of the fraud, and wrote upon his records the entry of satisfaction in good faith and in conformity with the provisions of the statute; that prior encumbrances were on record against Walston's property, and that the Prudential Company, who made Walston the loan of $9,500, and the other defendants financially interested in the loan, having no knowledge or notice of any alleged irregularity or defect in the cancellation of the deed of trust, had the legal right, as innocent parties, to accept the record as true, and to act upon it in the examination of Walston's title.

The appeal, then, presents these two questions: (1) Were the appellees warranted in relying upon the register's cancellation of the deed of trust in the records of his office? (2) If not, may the Prudential Company and the other claimants be subrogated to the rights of prior creditors whose securities they have paid? If the first question be answered in the affirmative, the second need not be determined.

The plaintiff argues that the entry made by the register of deeds did not discharge or release the deed of trust executed by Walston to Hill on 22 February, 1921, and, in support of its position, lays down what it denominates four fundamental propositions. In considering these propositions we may remark incidentally that this action was instituted before the amendments of 1923 went into effect. Private Laws 1923, cc. 192, 195.

It is first insisted on behalf of the appellant that a register of deeds is not authorized to cancel a deed of trust under any circumstances. As the register's official duties are prescribed by the General Assembly, it becomes necessary to refer to the statute. Section 2594 of the Consoli-

dated Statutes provides, in part, that any deed of trust or mortgage which is registered as required by law may be discharged and released in the following manner: "Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of 'satisfaction' on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled."

The plaintiff says that a deed of trust is not embraced in the term "other instruments," and that the use of the words "mortgage, deed of trust, or other instrument," in the first line of this subsection, and the omission of the words "deed of trust" in the seventh line, conclusively show that the register is not given power to cancel a deed of trust. We do not assent to this proposition. In the construction and interpretation of a statute, elementary principles demand that its purpose and spirit be considered and the obvious intention of the Legislature ascertained and respected; and, in accordance with these principles, the language used should be given such meaning as will make it harmonious with the legislative intent. In order to ascertain such intent, effect must be given to all clauses and provisions, unless they are irreconcilably conflicting or antagonistic to the fundamental law. Modern authorities generally favor the interpretation of statutes according to the natural and obvious signification of the wording, without resort to subtle and refined construction, for the purpose of either limiting or extending their operation. *McLeod v. Comrs.*, 148 N. C., 77; *Pullen v. Corporation Commission,* 152 N. C., 548; *Kearney v. Vann,* 154 N. C., 311; *Tripp v. Comrs.*, 158 N. C., 180; *Manly v. Abernathy,* 167 N. C., 220; 25 R. C. L., 962; Black on Interpretation of Laws, 56. It will be noted, moreover, that section 2595 directs the register of deeds, or his deputy, to enter upon the alphabetical indexes, on a line with the names of the grantor and the grantee, the words "satisfied deed of trust," when it appears that the satisfaction of such instrument has been acknowledged. Considering the statute as a whole, we are of opinion that the natural and reasonable interpretation of the language must refer the words "mortgage or other instrument" to the first line of the section—

"mortgage, deed of trust, or other instrument"; that the clauses must be construed together, and that "other instrument" essentially includes "deed of trust."

The plaintiff further contends that the note and the deed of trust did not bear the endorsement of payment and satisfaction by the payee or assignee, and that the statute makes no provision for cancellation by the *cestui que trust.*

Walston conveyed the legal title to Hill in trust for the holder of the note. It is true that neither Hill, the trustee, nor the plaintiff, as endorsee of the note, acknowledged its payment and satisfaction; but the payee in the original note was Tomlinson & Company, not the trustee. The substituted note was a reproduction of the original, without the endorsement. The trustee, who is an attorney, drafted the original note and the deed of trust, and these papers were subsequently delivered to Tomlinson & Company. Between that time and the date of the trial, the trustee never saw them. When the note was endorsed, the deed of trust was retained by the payee. It did not go into the hands of the plaintiff at any time. If, then, it be conceded that the endorsement of the original note carried the security with it (*Williams v. Teachey,* 85 N. C., 402, 404) and conferred upon the plaintiff the equitable right to subject to sale the property described in the deed of trust, still the deed of trust and a duplicate note answering to the one therein described and purporting to be the original, bore the acknowledgment of payment and satisfaction, duly endorsed by Tomlinson & Company, the payee in the note. There is no evidence that the register of deeds knew that the note exhibited to him was a duplicate instead of the original, and the exhibition of these papers, with the endorsement thereon, conformed to the terms of the statute, and authorized the register, nothing else appearing to him, to cancel the deed of trust by the entry of "satisfaction" on the margin of the record. C. S., 2594 (2). *Bank v. Sauls,* 183 N. C., 165, 169. It was the payee in the note who authorized the exhibition of the papers to the register and consented to their cancellation.

In the next place, the plaintiff urges the proposition that the note exhibited to the register of deeds was not the note which was endorsed to the plaintiff, and that the cancellation of the deed of trust was either forged or procured by fraud, and should be declared void and stricken out. In this connection it may be well to recur to one or two familiar principles. Whether or not the essence of forgery consists in the making of a false writing with intent to utter it as the act of one other than the party signing it, or whether the maker of the original note and the payee named therein fraudulently conspired to deceive the register and thereby compass the cancellation of the deed of trust, we need not con-

sider. We are not dealing with the right of the plaintiff to have the cancellation declared void on the ground that the register was deceived, because none of the contesting defendants had knowledge of the alleged fraud of the maker and the payee of the note, and the present action was brought after the Prudential Company had made the loan without notice. The paramount and dominant question is whether the defendants were warranted in relying on the register's entry of satisfaction as a record which imported verity, and as to this any doubt formerly existing has been resolved against the plaintiff's contention. The statute provides that every such entry shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee, or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed. C. S., 2594 (4). Our decisions are to the same effect. "It has been repeatedly declared to be sound public policy to remove every obstacle to the ready sale of real estate upon the market, in order to benefit commerce and thereby promote general prosperity. It was in furtherance of this object that our General Assembly, but a few years since, so altered our registration laws that persons proposing to purchase land could be well advised as to the title by a careful inspection of the public records." *Avery, J.*, in *Hughes v. Hodges,* 102 N. C., 237, 240. "An existing, uncanceled mortgage, properly admitted to registration, is constructive notice to subsequent purchasers of the mortgaged premises of the rights of the mortgagee; but a mortgage or deed of trust, properly canceled by a person authorized to cancel it, is notice to no one; it continues no lien upon the property. On the contrary, the entry of satisfaction by the proper person is conclusive of the fact of its discharge and satisfaction. . . . Upon what principle can a subsequent purchaser of property, once covered by a mortgage, but which, long before he deals with it, has been properly canceled and the entry of satisfaction properly entered on the records, be held to a notice of it in his examination of the records to ascertain the then condition of the title of the property he is negotiating to purchase? If at that time it is not an existing charge upon the property (and the entry of satisfaction by the proper person is to him conclusive that it is not), he has absolutely no concern with it; and no statute and no adjudication of any court that we have discovered requires him to observe it, or affects him with constructive notice of its presence on the books, and assuredly none of any equities dehors the deed growing out of a relation once existing, but by the entry of satisfaction, properly made, conclusively determined as to him. It was never contemplated that such a burden should be imposed upon a person negotiating for the purchase of real property that he should examine not only the record of cancellation of all recorded mortgages, but should read them and be

affected with notice of the relationship of mortgagor and mortgagee created by them, and to inquire as to the facts and circumstances and conditions of such relationship." *Manning, J.*, in *Smith v. Fuller,* 152 N. C., 13. In the recent case of *Bank v. Sauls, supra,* the *Chief Justice* said: "The second section of C. S., 2594, requiring cancellation, expressly provides that, if not canceled by the mortgagee or trustee, the mortgage or deed of trust, with the note secured, may be produced, and if marked satisfied, the register of deeds shall mark the instrument canceled. . . . The statute is plain, and in the absence of fraud, participated in by the creditor or purchaser, if the statute is followed, the creditor is protected by the entry of cancellation of the mortgage, which, if made in the manner provided by the statute, is conclusive." See, also, *Lumber Co. v. Hudson,* 153 N. C., 96; *Wood v. Tinsley,* 138 N. C., 508.

We must conclude, therefore, that the Prudential Life Insurance Company and the other contesting defendants are protected by the entry of satisfaction on the margin of the book in the office of the register of deeds as it appeared when the title to the encumbered property was examined, and that they were not required to go behind the record and inquire into the facts, circumstances and conditions under which the entry was made. *Smith v. Fuller, supra.*

The plaintiff takes the additional position that in no event is the nonsuit permissible, because the plaintiff is entitled to a judgment against Walston and Tomlinson for the amount due on the endorsed note, and to a sale of the personal property described in the deed of trust. We think not. The motion for nonsuit was made by the Prudential Company, the Chickamauga Company, P. L. Woodard, S. W. Anderson, H. G. Connor, Jr., trustee, S. J. Calvert, and the Armour Fertilizer Works. We have held that the nonsuit as to these parties was proper, and, upon his Honor's intimation to the same effect at the conclusion of the evidence, the plaintiff submitted to a voluntary nonsuit as to all the defendants. As the ruling of his Honor was correct, the plaintiff is concluded by its voluntary nonsuit as to the defendants, against whom it now claims the right to proceed.

Our disposition of the several questions herein considered makes it unnecessary to discuss the alleged right of some of the defendants to equitable subrogation.

The judgment is

Affirmed.

J. T. SHUTE v. CITY OF MONROE AND JAMES McNEELY, CITY TAX COLLECTOR.

(Filed 7 May, 1924.)

1. **Constitutional Law—Condemnation—Just Compensation.**

The principle that private lands may not be taken for a public use without just compensation is as much a part of our organic law as if it had been expressly written into our State Constitution.

2. **Same—Statutes—Procedure.**

The statutory provisions under which private lands may be acquired for a public use must ordinarily be complied with.

3. **State Highways—Highways—Statutes—Commerce.**

Construing the preamble with section 16 of chapter 2, Public Laws 1921, known as the State Highway Act, the Legislature considered it necessary to connect the principal towns and county-seats of the State, having hard-surfaced streets, with the State highway system of public roads, for the development of the State's agricultural, commercial and industrial industries.

4. **Same—Cities and Towns—Municipal Corporations—Streets—Assessments—Costs.**

Where a city or incorporated town, having three thousand inhabitants, or more, has a considerable portion of its streets hard-surfaced, the municipality may voluntarily assess and undertake the improvement of a street being a connecting link in the highway system.

5. **Same—Petition—Assessments.**

Where the State Highway Commission orders a connecting link to be hard-surfaced, and the municipality voluntarily agrees to make the improvement, it is not required, under chapter 56, article 9, that a petition of the abutting owners of land thereon be made. Section 16, *supra*, gives the governing body of the municipality power to make it an assessment district.

6. **Same—Constitutional Law.**

The assessment of the owners of land for hard-surfacing the streets of a city or incorporated town necessary to form a connecting link with the other streets already thus improved by assessment, preserves the equalization of assessments.

7. **Same—Benefits.**

It is a matter of common knowledge that the streets of a city or incorporated town forming a connecting link with the State system of highways will increase the value of the land abutting thereon in greater proportion than the lands along the other streets not so situated.

8. **Statutes—Interpretation—In Pari Materia—State Highways—Highways—Cities and Towns—Municipal Corporations.**

Chapter 56, article 9, providing for local improvements of the streets of a city or incorporated town by a method of assessing the owners of abutting land, and the State Highway Act (chapter 2, section 16, Public Laws 1921), are to be construed together *in pari materia.*

SHUTE *v.* MONROE.

THIS is a civil action for permanent restraining order, heard before *Shaw, J.,* at February Term, 1924, of UNION. Appeal by plaintiff.

The plaintiff is a resident of the city of Monroe and brings this action to permanently restrain and enjoin the said city and its tax collector, James McNeely, from levying upon his property for the purpose of collecting the assessment made against his property for the improvement of what is known as Charlotte Avenue. The plaintiff is the owner of a piece of property in the city of Monroe and contends that without authority of law and against his protest, the city of Monroe, in July, 1922, appropriated a part of his property for a so-called street or roadway, from Crowell Street to the right of way of the Seaboard Air Line Railway Company, a strip of land 70 feet in width a large part of the distance and 41 feet at its narrowest point. The land taken for the street was about one-third of the lot and the balance was left useless for development and practically worthless, without compensating the plaintiff for same. That after the street had been laid off and graded, the city, without authority of law, declared an assessment district for said street from Crowell Street to the city limits, and proceeded to pave the same.

That no petition was filed by a majority of the abutting property owners, etc., in accordance with C. S., ch. 56, art. 9. That the so-called street is not properly a street of the city, but is a connecting link of the State Highway system through the city, which is a city of more than 3,000 inhabitants according to the last U. S. census. That a considerable part of the streets of Monroe had been previously paved and hard surfaced. That the only use or purpose of this improvement was to connect the State Highway system with the city of Monroe, and as such no part is legally chargeable to the abutting property owners. That the assessment is illegal and confiscatory and is taking plaintiff's property without due process of law.

The defendants, on the other hand, contend that the city of Monroe, during the year 1922, built a splendid street through the lot of plaintiff, on which he operates a public gin and mill, and the street has greatly increased the value of plaintiff's lot. That the city of Monroe declared an assessment district on the street, which it had opened through plaintiff's property, known as Charlotte Avenue, and paved said street from Crowell Street to the city limits; all of which was legally done. That under the provisions of law it was not necessary for a majority in number of abutting property owners to file a petition to have the street improved and paved. That the State Highway Commission did request and demand of the city to open and pave said avenue, and that the city of Monroe did open, improve and pave said avenue in accordance with the demand of the State Highway Commission, and the

improvement was made to connect the streets of the city with the Charlotte Highway, and provide for the safety and convenience of the public, and for the improvement of adjacent property. That the public interest demanded the street being opened and paved and the same was beneficial to adjacent property. That the city made the assessment against the plaintiff's property abutting on said street 1,097 feet. That as a matter of fact the defendant owns a number of adjacent lots which constitute one large lot, and on this lot the plaintiff has erected a valuable gin and mill plant to which he solicits the patronage of the public; that this property of the plaintiff was formerly on a back street and difficult of access, and as a result of the improvements made by the defendant city of Monroe, the said property has been placed upon a public and improved street, and has been increased in value by much more than the cost of the paving assessed against it. That the plaintiff is the owner of a large lot and a valuable ginning and milling plant near the old G. C. and N. Railway tracks in the city of Monroe; that prior to the year 1922 there was no approach to the defendant's property from the north of the city, from which he drew most of his patronage, except through a dangerous underpass under the property of the S. A. L. Railway Company and through a narrow and rugged road or street; that during the year 1922 the defendant city of Monroe decided to improve said street by widening, straightening and paving same and by extending same in a direct course from the city limits to Jefferson Street through the property of the plaintiff and directly in front of his splendid ginning plant; that this improvement was made as hereinbefore stated upon the demand of the State Highway Commission in order to furnish the proper connecting link between the paved streets of the city of Monroe and the paved Charlotte Highway, but same was also demanded for the safety and convenience of the public and for the improvement of property in the city lying along said avenue; that as a result of the opening and widening, improving and paving of said street or avenue, a splendid paved street has been built by and through the plaintiff's property and his business has been placed upon one of the principal avenues of the town, and the approach thereto has been rendered safe, whereas it was formerly dangerous, and his trade has been increased and his property has been enhanced in value by much more than the amount assessed against it. That the creation of the assessment district under which Charlotte Avenue was paved was done openly and publicly, and the plaintiff stood by and saw said avenue paved through his property and made no protest against the paving of same, but allowed his property to be benefited and improved by the paving of said street without protest on his part, and defendants are advised and believe that on account of his conduct, his silence and his acquiescence,

he is estopped to question the validity of the assessment made against him for the paving of said street.

The plaintiff in reply contends that at all times he protested against the action of the city of Monroe in attempting to charge the improvement against him and the other property owners.

The defendant contends that "some time in the month of October, 1922, it was ascertained that the city of Monroe would not be able to pave Charlotte Avenue in the manner ordinarily pursued by the city in the paving of its streets, and that the city would be unable to carry out its promise to pave Charlotte Avenue to connect with the National Highway except in accordance with the provisions of section 16, chapter 2, of the Public Laws of 1921, and upon this fact appearing to the State Highway Commission, the said commission addressed to the mayor of the city of Monroe a letter dated 11 October, 1922, directing the city of Monroe to improve the said Charlotte Avenue pursuant to section 16, chapter 2, of the Public Laws of 1921, and that thereupon the city of Monroe proceeded to order said Charlotte Avenue paved and the cost thereof taxed against abutting property pursuant to section 16, chapter 2, of the Public Laws of 1921; that the plaintiff took no steps to hinder or delay the paving of Charlotte Avenue, but on the contrary allowed the paving to proceed, and acquiesced therein and accepted the benefits thereof, and made no protest until after the said paving was done and the plaintiff's property was benefited thereby. That the Road Commission of Union County paid the sum of $4,289.37 for grading Charlotte Avenue from Crowell Street to the city limits, and that this sum was included in the amount taxed against the abutting property owners, but defendants aver that since the institution of this action they have eliminated the said item of $4,289.37 from the amount taxed against abutting property, and have amended the assessment roll in accordance therewith, and have decreased the amounts assessed against the abutting property owners proportionately."

On 11 October, 1922, Frank Page, chairman State Highway Commission, addressed the following communication to J. C. M. Vann, mayor of Monroe:

"You are hereby advised that it is found necessary by the State Highway Commission of North Carolina to connect the State Highway system with the streets of the city of Monroe, and that, pursuant to the authority vested in the said State Highway Commission by section 16, Public Acts of North Carolina, Session 1921, you and the other municipal officials of the city of Monroe are hereby directed and commanded to cause to be improved and hard surfaced, all of the present unimproved portions of Main Street, along Jefferson Street to Charlotte Avenue, and thence to the city limits, or, in other words, all of the por-

tion of the State Highway traversing the corporate limits of the city of Monroe, the entire cost of construction of said streets traversed by the State Highway to be borne by the city of Monroe.

"You are further advised that it is the sense of the State Highway Commission that this particular and highly important and necessary construction does not constitute an 'extraordinary case,' as contemplated by the second paragraph of the section above referred to.

"Under the further provisions of the section of said act, as above referred to, you are further and hereby commanded, through the governing body of the city of Monroe, to declare an assessment district as to the streets to be improved as above indicated, such work to be completed within six months from the first day of November, 1922."

The following resolutions were unanimously adopted by the board of aldermen of the city of Monroe:

"Whereas the State Highway Commission, through its chairman, Frank Page, in accordance with the provisions of section 16 of chapter 2 of the Public Laws of North Carolina of the Session of 1921, has notified and required the municipal officials of this city to cause to be improved and hard-surfaced all the present unimproved portions of Main Street along Jefferson Street to Charlotte Avenue, and thence Charlotte Avenue to the city limits; and whereas all of such portion of the streets referred to in said notice have been improved and hard-surfaced, except that portion of Charlotte Avenue from its intersection with Crowell Street to the city limits:

"Now, therefore, be it resolved, that Charlotte Avenue be improved in accordance with the provisions of the laws of the State of North Carolina, by paving that portion of same from its intersection with Crowell Street to the northern line of the town or city limits, said improvements to consist of draining, grading, curbing and guttering said Charlotte Avenue, paving to be of sheet asphalt upon a four-inch concrete base; base under the underpasses shall be eight inches thick; paving, curbing and guttering to be made and laid and the work done in accordance with the specifications now on file and in force governing street improvement and heretofore agreed on between the city of Monroe and the Redmon Construction Company.

"It is further resolved, that the contract for improvement in this district, except grading, be and the same is hereby awarded to the Redmon Construction Company, at the price agreed upon in contract with said company for the improvement of Jefferson Street and Charlotte Avenue to Crowell Street; that no advertisement is necessary or required for the letting of this contract, in view of the existing emergency and the fact that the price agreed upon in contract with Redmon Construction Company and the city for the improvement of Jefferson Street and

Charlotte Avenue to Crowell Street were made and accepted in contemplation of, and as a part of, the proposed present improvement."

"Whereas the city of Monroe, North Carolina, by order and requirement of the State Highway Commission, has made provisions for the improvement by draining, paving, curbing and guttering all that portion of Charlotte Avenue from its intersection with Crowell Street to the city limits:

"Now, therefore, be it resolved by the board of aldermen of the city of Monroe, that said portion of Charlotte Avenue from its intersection with Crowell Street northwardly to the corporate limits be and the same is hereby declared an assessment district as to that portion of said street or avenue to be improved, without petition by the owners of property abutting thereon, and that the total cost of the improvement in said assessment district be and the same is hereby charged to the owners of property abutting on said improvements, as provided by law."

The plaintiff J. T. Shute and others filed allegations and objections on 2 April, 1923, before the board of aldermen to the confirmation by the board of the assessment roll. The allegations and objections before the board to special assessment for paving Charlotte Avenue are practically the contentions of plaintiff heretofore set forth. The defendants contend that the same were filed after the assessment roll was approved, which was on 1 March, 1923.

The court below dissolved the temporary restraining order and dismissed the action. The plaintiff excepted and assigned error, and appealed to the Supreme Court.

The other material facts will be set forth in the opinion.

J. F. Milliken for plaintiff.
Parker & Craig for defendant.

CLARKSON, J. Before passing on the main questions presented by this appeal, it is meet and proper to consider a matter appearing from the record that is of supreme importance—the taking of plaintiff's land, to be used as a part of Charlotte Avenue, without just compensation.

From the record it does not appear that this matter has been finally adjudicated. The record shows that the board of aldermen, on 14 July, 1922, unanimously adopted the following ordinance:

"Ordinance opening Charlotte Avenue.

"The Board of Aldermen of the City of Monroe, N. C., do ordain:

"1. That a public street, 40 feet wide, to be called Charlotte Avenue, be laid out and opened from a point on Bear Skin Creek, in the northern boundary of the city limits, and running in a southerly direction, passing under the two new underpasses of the Seaboard Air Line Railway Company, to Jefferson Street at a point west of Stewart Street, said

street to be laid out according to the plan and specifications of the State Highway Commission and as shown on a blueprint made by said State Highway Commission.

"2. Be it further ordained, that the land covered by said street be and the same is hereby condemned and appropriated for the uses and purposes of a public street.

"3. That Alderman James W. Fowler be empowered and directed to negotiate with the owners of the land covered by said avenue with a view of getting deeds for said land, and in case said James W. Fowler cannot reach an agreement with the owners of the land, then and in that event the city clerk is authorized and required to issue notice to such owner who fails to agree with the city, notifying such owner to select an arbitrator as provided in section 22 of chapter 352 of the Private Laws of 1899."

Section 22, *supra,* is as follows: "That the board of aldermen shall have power to lay out, open and name any street or streets within the corporate limits of said city whenever by them deemed necessary, and shall have power to widen, enlarge, change, extend or discontinue any street or streets or any part thereof within the corporate limits, and shall have full power and authority, for the purposes herein expressed, to condemn, appropriate or use any land or lands within said city, upon making reasonable compensation to the owner or owners thereof; and in case the owner or owners of any land which shall be condemned, appropriated or used under the provisions of this act, and the board of aldermen shall fail to agree upon the compensation for such land, the matter shall be settled by arbitrators, who shall be freeholders and residents of said town, and shall be chosen by the parties—one by the aldermen and the other by the owner of said land; and in case the owner of such land shall fail or refuse, upon notice given, to choose such arbitrator, then the mayor of said city shall select one in his stead; and in case the two chosen as aforesaid cannot agree, they shall select an umpire, whose duty it shall be to examine the land condemned and ascertain the damages sustained and the benefits accruing to the owner in consequence of the change; and the award of the arbitrators and umpire, or any two of them, shall be conclusive of the rights of the parties, and shall vest in the city of Monroe the right to use the land for the purpose herein specified; and all damages agreed upon by the parties or awarded by the arbitrators, in case of disagreement, shall be paid by taxation or as other liabilities of the corporation: *Provided,* that either party may appeal to the Superior Court as now provided by law."

The plaintiff's contention in the complaint is that this was done without authority of law. The proceeding before the board of aldermen to condemn this land was started in accordance with law, but it is nowhere

shown that the matter has been completed in accordance with section 22, *supra*. The plaintiff's rights in this matter are well settled in this State.

It was said in *Parks v. Comrs.*, 186 N. C., 498: "Where the Legislature has prescribed a method of procedure, the statute on the subject must ordinarily be followed." From the record, the condemnation of plaintiff's land was commenced under the procedure prescribed by the statute, but not completed according to the statute.

The Anglo-Saxon holds no material thing dearer than the ownership of land; his home is termed his "castle." Although there is nothing in the Constitution of North Carolina that expressly prohibits the taking of private property for public use without compensation (the clause in the United States Constitution to that effect applies only to acts by the United States and not to government of the State), yet the principle is so grounded in natural equity and justice that it is a part of the fundamental law of this State that private property cannot be taken for public use without just compensation. *Johnston v. Rankin*, 70 N. C., 555.

In the instant case the statute of the city of Monroe provides the method, and this must ordinarily be followed. The Legislature has granted this power, and we can only follow the mandate in the manner and way set forth in the act. *Long v. Rockingham, ante*, 204.

Now, the main question presented by this case is: Is the assessment on plaintiff's land for the improvement and pavement of Charlotte Avenue in accordance with law and valid and binding on the plaintiff? We think it is.

The preamble of the State Highway Act (chapter 2, Public Laws 1921) is as follows: "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads connecting by the most practicable routes the various county-seats and other principal towns of every county in the State, for the development of agriculture, commercial and industrial interests of the State, and to secure benefits of Federal aid therefor, and for other purposes."

Section 16 of this act is as follows: "That when any portion of the State highway system shall run through any city or town of more than three thousand inhabitants, according to the last United States census, the streets of which in some considerable part shall have been paved or hard-surfaced prior to such highway construction, and it shall be found necessary to connect the State highway system with such improved streets as may be designated as part of such system, the State Highway Commission shall bear the entire cost of constructing such connecting links, the same to be uniform in dimensions and materials with such State highways, unless such city or town shall voluntarily assume and undertake the improvement of the streets forming such connecting links according to specifications approved by the State Highway Commission.

In all other cases of improving streets of cities and towns of over three thousand population embraced in the State highway system the entire cost of construction shall be borne by the cities and towns traversed by such highways: *Provided, however,* in extraordinary cases, or when the conditions, in the opinion of the State Highway Commission, justify it, said commission may in its discretion relieve any city or town of any or all of the cost of the construction of said road through said city or town, or may impose such conditions upon or make such arrangements with said city or town in connection with the construction of said road as in its discretion may seem wise and just, under all the facts and circumstances in connection therewith: *Provided further,* that whenever any street designated as part of the State highway system shall be surfaced by order of the State Highway Commission at the expense, in whole or in part, of a city or town, it shall be lawful for the governing body of such city or town to declare an assessment district as to the street to be improved, without petition by the owners of property abutting thereon, and to charge the proportionate cost thereof to such property.

"Notice shall be given such incorporated cities or towns by the State Highway Commission of hard-surfacing work to be done within their corporate limits, and on streets that are links in the State highway system, and said notice shall also set forth a reasonable time as to when said work shall be completed: *Provided,* that if said city or town fails to do work or fails to complete same within the time specified or within the requirements of the State Highway Commission, then it shall be the duty of the State Highway Commission to take over said work, charging all expenses incurred therefor, which are properly chargeable under this section, to said city or town, subject, however, to the foregoing provisos and conditions."

From a careful reading of section 16, *supra,* and the preamble to the State Highway Act, we conclude that the following is, in substance, a just interpretation of its meaning:

That it was necessary that the State highway system have the connecting links built through the cities and towns of the State to make a complete State system of hard-surfaced and dependable roads connecting by the most practicable routes the various county-seats and other principal towns of the State, for the development of agriculture, commercial and industrial interests of the State.

In cities or towns of over three thousand inhabitants, according to the last United States census, two provisions are made to build the hard-surfaced roads through these cities and towns as a connecting link in the system:

(1) In the cities and towns *the streets of which in some considerable part shall have been paved or hard-surfaced* prior to such construction,

and it shall be found necessary to connect the State highway system with such improved streets as may be designated as part of such system, the State Highway Commission shall bear the entire cost of constructing such connecting links, *unless such city or town shall voluntarily assume and undertake the improvement of the streets forming such connecting links.*

(2) In all other cases of improving streets of cities and towns of over three thousand population, embraced in the State highway system, the entire cost of construction shall be borne by the cities or towns traversed by such highways.

In *extraordinary cases,* or when the conditions, in the opinion of the State Highway Commission, justify it, the commission may in its discretion relieve any city or town of any or all of the cost of constructing the connecting link, or impose such conditions upon or make such arrangements with the city or town as in its discretion may seem wise and just.

When the State Highway Commission orders any street to be hard-surfaced to make the connecting link, at the expense, in whole or in part, by the city or town, it shall be lawful for the governing body to declare an assessment district as to the street to be improved, without petition by the owners of property abutting thereon, and to charge the proportionate cost thereof to such property. This also applies when a city or town voluntarily assumes and undertakes the improvement.

Taking a common-sense, liberal view, and the intent and purpose of the act, we find two bodies—the State Highway Commission and the mayor and board of aldermen of the city of Monroe—both desirous of connecting up the city of Monroe with the Wilmington-Charlotte-Asheville Highway, a part of the State system, over Charlotte Avenue. The serious question arises, who shall pay for this improvement in the city of Monroe? It is to be hard-surfaced and improved like other links in the State system along this particular route. The State Highway Commission refused to pay for it or any part of it, and found it a necessary link in the State system, and ordered it to be hard-surfaced. What must the mayor and board of aldermen do—sit idly by, or, under section 16, "voluntarily assume and undertake the improvement of the streets forming such connecting link," etc.? They had this discretion. Under the law, others who had the streets hard-surfaced had to pay for their proportionate part of the assessment. Could they relieve the plaintiff and others, who had property along Charlotte Avenue, of the assessment, when other property owners in the city of Monroe had paid for their improvements? Would they not have given a special privilege, or "coat of many colors," to the plaintiff and others along Charlotte Avenue? Would not others who paid for their street improvement have felt that

all who had hard-surfaced streets should pay alike—that equal rights and equal benefits and burdens should be meted out to all the inhabitants of the city of Monroe in reference to hard-surfaced streets? To make all pay for the improvements on the same basis, the city voluntarily assumed and undertook the improvement of this connecting link and declared this link an assessment district.

The board of aldermen of the city of Monroe, under the act (section 16, *supra*), had the legal right to "voluntarily assume and undertake the improvement of the street (Charlotte Avenue) forming such connecting links," etc. That it had the legal right, without petition of a majority of the abutting owners of property, "to declare an assessment district as to the street to be improved," etc., Charlotte Avenue. It is a matter of common knowledge that the State highway going along Charlotte Avenue will make it no ordinary street, but a thoroughfare, and enhance values more than over other streets. No objection having been made to the assessment, etc., by the plaintiff, in the mode and manner prescribed by law, the same was legal and binding on plaintiff.

We think C. S., ch. 56, art. 9, and the State Highway Act are *in pari materia,* and are to be construed together. *Battle v. Mercer, ante,* 446. Chapter 56, article 9, *supra,* provides for local improvements. How assessments levied—one-half on abutting property, etc. These statutes were substantially complied with.

It may be noted that the court below deducted from the assessment on the property of plaintiff and others what the county contributed and paid for grading on Charlotte Avenue, some $4,289.37, and approved the assessment roll for the balance.

From the evidence as it appears from the record, and the law as we construe it to be, we think the court below was correct when it dissolved the restraining order, refused a permanent restraining order or injunction, and dismissed the plaintiff's action.

Affirmed.

J. WALTER LOVELACE ET ALS. v. T. R. PRATT ET ALS., COMMISSIONERS OF ROCKINGHAM COUNTY.

(Filed 7 May, 1924.)

1. Counties—Schools—Taxation—Constitutional Law — Election — Approval of Voters.

When necessary to maintain the six-months term of public schools required by the Constitution, Art. IX, it is within the legislative authority in establishing its State-wide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administra-

tive units of the public-school system of the State; and it is not required, in this instance, that the question of taxation for the purpose be submitted to the voters of the territory, under the provisions of the Constitution, Art. VII, sec. 7. *Lacy v. Bank*, 183 N. C., 373, cited and applied.

2. Same—Statutes.

The county commissioners, under the provisions of the Consolidated Public School Law of 1923, are given authority to fund the outstanding indebtedness of a school district for the necessary maintenance of a six-months term of public schools existing prior to 1923, when in excess of ten thousand dollars, by issuing serial notes of the county or serial bonds thereof, and to levy annually a special *ad valorem* tax on all the tangible property of the county sufficient to pay the same, principal and interest as they mature, in addition to all other taxes authorized by law to be levied therein; and such indebtedness, incurred upon the order of the county commissioners, upon petition of the school district therein, upon plans for necessary buildings and their location, approved by the State Superintendent of Public Instruction, is a valid binding obligation upon the county.

CIVIL ACTION, heard on return to preliminary restraining order and demurrer to complaint, before *Bryson, J.*, at chambers in Winston-Salem, N. C., on 20 March, 1924.

The action is brought by plaintiffs, citizens and taxpayers of Rockingham County, to enjoin an intended bond issue by defendant board for the purpose of paying off or settling an indebtedness incurred by the county to the amount of $45,000 and $4,000 interest, for the construction of two schoolhouses in two of the school districts of the county, same being necessary to the proper maintenance of a six-months school term in said districts. The facts pertinent to the question sufficiently appear from an excerpt from plaintiff's complaint, as follows:

"That a duly certified copy of the above-mentioned resolution was duly filed with the board of commissioners of Rockingham County, and said board of commissioners, at a regular meeting, held on 3 December, 1923, passed the following resolution:

" 'Be it resolved by the Board of County Commissioners of Rockingham County:

" 'Section 1. That this board finds and determines that the County Board of Education of Rockingham County has certified to this board a resolution passed by said county board of education on 3 December, 1923, requesting this board to fund, under article 23, chapter 136, Public Laws 1923, certain county indebtedness, concerning which said board of education has made in said resolution the following findings and determinations:

" '(a) $49,000 of the debt of Rockingham County, being $45,000 of principal and $4,000 interest accrued to this date, making a total of $49,000, was incurred by the board of county commissioners before

1 January, 1923, for money borrowed to erect school buildings in the following districts in said county: $20,000 borrowed to erect a school building in Stoneville Consolidated School District; $25,000 borrowed to erect a school building in Wentworth Consolidated School District.

"'(b) Each of said school buildings was erected at the request of the board of education.

"'(c) The plans for said buildings and the location of the same were duly approved by the State Superintendent of Public Instruction.

"'(d) At the time of said requests and said erections no school buildings were in existence in Stoneville Consolidated District and Wentworth Consolidated District, and the erection of all of said buildings was necessary in order to provide for the six-months school term required by the Constitution.

"'(e) None of said school districts was then a special-charter district or local-tax district, and in none of them had any special tax been voted for school purposes.

"'(f) No part of the above debt was created for money borrowed from the State of North Carolina.'"

Upon these facts, admitted to be true by the demurrer, there was judgment that plaintiff was not entitled to further continuance of the restraining order, and that same is dissolved. Plaintiffs excepted and appealed.

D. F. Mayberry for plaintiff.
P. W. Glidewell for defendants.

HOKE, J. The Consolidated Public School Law (chapter 136, Laws 1923, article 23) provides, in effect, that when the outstanding indebtedness created prior to the year 1923 for the necessary expenses of conducting a six-months school in the respective counties, shall exceed the sum of $10,000, the boards of county commissioners are authorized, empowered and directed to fund the same by issuing the serial notes of the county, or serial bonds thereof, for the amount of such indebtedness, and to levy annually a special *ad valorem* tax on all the tangible property of the county sufficient to pay said obligations, principal and interest as they mature, and that such tax shall be in addition to all other taxes authorized by law to be levied in said county. And, further, that when the note or notes of a county have been issued for funds borrowed to erect school buildings at the request of the board of education, and required to provide for the necessary school buildings to maintain a six-months school, the said notes are in all respects validated and may be funded as authorized and directed by this article.

On perusal of the record, the facts bring the case clearly within these statutory provisions; and it appearing further that the indebtedness was

contracted for the erection of buildings within two regular school districts of the county, and that they were necessary to a proper maintenance of a six-months school in the same, as required by Article IX of the Constitution, it was fully within the power of the Legislature to assume this indebtedness and direct that it be provided for by the respective counties as administrative units of the public-school system of the State. *Lacy v. Bank,* 183 N. C., 373; *Jones v. Comrs.,* 137 N. C., 579.

We are cited by counsel for the plaintiff to several decisions of the Court in which it was held that the erection of school buildings is not a necessary municipal expense, and therefore a county cannot be brought under this indebtedness without the approval of the electorate, as required by Article VII, section 7, of the Constitution; but without impingement on those decisions or the principle they really present and uphold, the later and authoritative cases are to the effect that they do not apply to an indebtedness incurred by legislative authority in carrying on the public-school system of the State and the necessary maintenance of a six-months school term, as required by the Constitution.

In the case of *State Treasurer Lacy v. Bank, supra,* the Legislature had provided for a building fund for educational purposes of $5,000,000, to be loaned to the counties of the State for the erection of necessary and adequate school buildings, the counties to execute their bonds to repay the State amounts advanced to them under the act. It was urged that the act was unconstitutional in that a county indebtedness was thereby created without the sanction of popular vote, and in disapproval of the position the Court said:

"Nor can the second objection of appellant be allowed to prevail, that the statute will impose upon the counties of the State an obligation to repay the amount of money loaned to them without a vote of the people therein as required by Article VII, section 7, of the Constitution. It is said by a writer of approved merit that a constitution shall be construed on broad and liberal lines, and so as to give effect to the intention of the people who adopted it. Black on Interpretations (3 ed.), pp. 75 and 76. And to that end it is held that the instrument should be considered as a whole and construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment.

"Applying the principle, the restrictions contained in this Article VII, section 7, which prohibits counties, cities and towns, or other municipal corporations, from contracting debts or levying taxes except for necessary expenses unless approved by a majority of the qualified votes therein, must be understood to refer to debts and taxes in furtherance of local measures, and do not extend to a State-wide measure of

the instant kind, undertaken in obedience to a separate provision of the Constitution, and in which the counties are, as stated, expressly recognized as the governmental units through which the general purpose may be made effective.

"The position is presented and clearly approved in principle in the *Collie case, supra.* There and at that time there was, in Article V, section 1, of the Constitution, a limitation on the rate of taxation for general State and county purposes which at times, and in that instance, operated to prevent the maintenance of the public schools for the constitutional term of four months (since changed to six), and the Court held that in order to harmonize the two provisions and to allow each its proper significance, the general limitation must yield so as to permit a sufficient tax levy to maintain a school for the specified school term expressly required by Article IX of the Constitution. In the various decisions of the Court in which it has held that the incurring of debts, levying of taxes by counties or other municipal corporations were not to be regarded as necessary expenses within the meaning of Article VII, section 7, of the Constitution, they were either cases of cities or towns or special districts, or the purpose was to provide means for maintaining schools longer than the constitutional term, or they were cases of some school in a special locality enacted without any reference in maintaining a State-wide school system for any specified term, and in which the constitutional requirement in question was in no way presented or considered."

We regard the principle so stated as controlling on the facts of the present record. What the Legislature may authorize it can as a rule ratify and approve, *Board of Education v. Comrs.*, 183 N. C., 300, and having taken over and used these school buildings as part of the public school system, it having been established or admitted that the same are necessary to a proper maintenance of the six months school term, it has in our opinion the power to assume and direct the payment of the indebtedness as it has done, and without the approval of the local vote.

Affirmed.

E. J. BAGWELL v. N. C. HINES AND R. W. WINSTON, JR.

(Filed 7 May, 1924.)

Deeds and Conveyances—Estates—Remainder—Rule in Shelley's Case.

Except when otherwise controlled by an arbitrary rule of law, as by the rule in *Shelley's case*, the interpretation of a deed should effectuate the intent of the parties; and where a fee simple is conveyed by a deed to brother and sister, in express terms, with *habendum* to them for and

during their joint lives, and to the survivor with remainder in fee to his or her heirs: *Held*, there is nothing in the *habendum* clause sufficient to affect the fee-simple title theretofore conveyed; and where the sister has died leaving her interest by will to her brother, the latter acquires the absolute fee-simple title to the entire estate.

CONTROVERSY without action submitted on case agreed before *Grady, J.*, presiding at March Term, 1924, of WAKE.

From the facts formally presented it appears that plaintiff has contracted to sell and convey a good title to defendants to a certain piece of real estate in said county, duly described in the contract, at the stipulated price of $10,000, and defendants, admitting the contract to purchase at the price stated, have declined to pay, alleging that plaintiff cannot make a good title in accordance with his contract.

The question is chiefly dependent on the terms of a deed for the land made in 1898 by W. J. Andrews to plaintiff and his sister, Martha J. Bagwell, and certain facts relevant to the present condition of the title therein conveyed:

"This deed, made this 28 February, 1898, by William J. Andrews, party of the first part, to E. J. Bagwell and Miss Martha J. Bagwell, parties of the second part, all of Wake County, State of North Carolina:

"Witnesseth: That the said William J. Andrews, for and in consideration of the sum of six hundred dollars ($600), in hand paid, the receipt of which is hereby acknowledged, has bargained, sold and conveyed, and by these presents does hereby bargain, sell and convey to said E. J. Bagwell and Miss Martha Bagwell, their heirs and assigns, in fee simple, a certain tract of land lying and being about four (4) miles west of the city of Raleigh, and described as follows:

"To have and to hold the said premises above described, with all the appurtenances, rights, tenements, hereditaments and privileges thereto in any wise appertaining or belonging, to the said E. J. Bagwell and Miss Martha Bagwell, for and during their joint lives, with a remainder to the survivor for and during his or her life, and after his or her death the remainder in fee to the heirs of E. J. Bagwell and Miss Martha J. Bagwell: *Provided,* that the said E. J. Bagwell and Miss Martha J. Bagwell, or either of them, shall have the right to change their said and several estates by duly executed note or notes and mortgage or mortgages."

That Martha J. Bagwell, the sister, never having married, died without issue, leaving a last will and testament in which her entire property, including her interest in the land, is devised to plaintiff, her brother, who has never married.

Upon the facts pertinent to the inquiry, the court being of opinion that the title offered was a good one, gave judgment for plaintiff, and defendants excepted and appealed.

A. B. Andrews for plaintiff.
Winston & Brassfield for defendants.

HOKE, J. It was formerly held in this jurisdiction, and with some strictness, that the *habendum* of a deed was not allowed to destroy an estate or interest definitely conveyed in the premises or to create an estate that was necessarily repugnant to it. *Wilkins v. Norman,* 139 N. C., 39; *Blackwell v. Blackwell,* 124 N. C., 269; *Rowland v. Rowland,* 93 N. C., 214; *Hafner v. Irwin,* 20 N. C., 570. The position was somewhat modified in the well-considered case of *Triplett v. Williams,* 149 N. C., 394, opinion by *Associate Justice Brown,* wherein it was held that except when otherwise controlled by an arbitrary rule of law, as by the rule in *Shelley's case,* the question was largely one of intent, and if on a perusal of the entire instrument, including the *habendum,* it clearly appeared that a lesser estate was intended than that conferred in the premises, such a construction should prevail and the intent of the grantor be given effect, a case that has been cited with approval in numerous decisions of the Court.

Considering the record in view of these positions and in full recognition of the principle approved in *Triplett v. Williams,* we are of opinion that his Honor was clearly right in his decision that the plaintiff can make a good title to the property. In the premises of the deed a fee simple in the property is clearly conveyed to plaintiff and his sister—it says so in express terms—and there is nothing in the subsequent portions of the deed that is necessarily repugnant to the estate and interest so definitely conferred.

True, in the *habendum* the deed seems to indicate that the grantees should first be the recipients of a life estate and with a life estate to the survivor, but in this part of the deed the interest conveyed would seem to be a fee simple under the rule in *Shelley's case, Walker v. Taylor,* 144 N. C., 175, and assuredly there is in the *habendum* no repugnancy expressed with sufficient clearness to affect or modify the definite estate in fee simple conveyed to plaintiff and his sister in the premises of the deed. The sister having died leaving a last will and testament conveying all of her interest to plaintiff, in our opinion, as stated, the title offered is a good one and defendants must be held to comply with their contract of purchase.

Affirmed.

IN RE MORTGAGE SALE OF J. H. WARE PROPERTY.

(Filed 7 May, 1924.)

1. Sales—Mortgages—Statutes—Clerks of Court—Jurisdiction.

Under the provisions of C. S., 2591, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale of a mortgage when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law.

2. Same—Appeal.

The discretion vested in the Superior Court judge on appeal from the clerk, C. S., 637, to hear and determine the matter in controversy, unless it appear to him that justice would be more cheaply or speedily administered by remanding it to the clerk, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under C. S., 2591, to further pass thereon in the absence of an increased bid.

APPEAL by J. H. Ware from *Shaw, J.*, at November Term, 1923, of DAVIDSON.

On 24 March, 1920, J. H. Ware executed to Mrs. M. McIntyre a mortgage to secure an indebtedness of $2,000. The mortgage was duly recorded. After default in payment of the indebtedness, the mortgaged land was advertised under the power of sale in said mortgage and sold on 27 September, 1923. The proceedings were regular in all respects.

The sale was reported to the clerk of the Superior Court of Davidson, and no advance bid having been filed by the clerk, the mortgagee on 11 October, 1923, executed to the purchaser a deed for said lands which was probated 16 October, 1923, and filed for registration in the office of the clerk the next day at 8:15 a. m. Thereafter, on 17 October, the appellant filed his petition asking as a matter of equity that confirmation of said sale be refused and a resale ordered on the allegation that the price paid was inadequate and that the notice of sale had stated that the terms of sale were cash on confirmation, but that the sale had not been confirmed by the clerk. The clerk of the court refused to grant the petition, and on appeal to the Superior Court the judge, upon the above facts as found by the clerk, and after hearing further evidence and argument, affirmed the judgment of the clerk, holding that he had no power to set aside the sale, but added that if he had the power he would in his discretion set it aside. Appeal by petitioner.

Walser & Walser for petitioner.
H. R. Kiser for appellee.

CLARK, C. J. There is no allegation in the petition of any fraud nor of any irregularity, and upon the facts found by the clerk, the sale was in every respect regular.

C. S., 2591, provides: "In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance."

In re Sermon's Land, 182 N. C., 128, *Hoke, J.,* says: "The statute, sec. 2591, in express terms provides that any and all sales of this kind shall remain 'unclosed for ten days,' but it confers no power on the clerk to make any orders in the matter except in case of an increase of bid, nor is any report required to be made in any other instance. That and that alone is the basis for his interference in sales of this kind. It might be well in the case presented that the law should give the clerk jurisdiction to make the order that justice and right would require, but thus far the statute has not done so, and we are not at liberty to go beyond the statutory provision."

In *Pringle v. Loan Assn., ibid.,* 317, it is said: "This statute has been construed at this term, *In re Sermon's Land, ante,* 122, not to require a report to the clerk of every sale made under a mortgage with power of sale, but that in all such cases, if the prescribed amount of the raise in bid is guaranteed or paid to the clerk, he shall require the mortgagee or trustee to advertise and resell on fifteen days notice. In short, the condition of a mortgagor in a mortgage with the power of sale is assimilated to the condition of property sold under the decree of foreclosure so far as the right to set aside the bid at the first sale and to require a resale."

No raised bid having been filed, there was no authority or discretion vested in the clerk or judge to set aside the deed to the purchaser. The mere statement in the order of sale that it be for cash upon confirmation meant only that the cash would be required if the bid was not raised in the time prescribed by law.

The appellant invokes C. S., 637, which provides that "Whenever a civil action or special proceeding begun before a clerk of the Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the re-

quest of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." This is a very wise statute, and its purpose was to prevent sending cases backwards and forwards from the clerk to the court, on perhaps mere technicalities, by providing that when the matter had reached the court for any ground whatever, the judge had the discretion to proceed and render a final decision. It does not give the judge any jurisdiction, or any additional discretion more than he would have had if the case had come to him in any other manner except that he might proceed and determine it without the formality of returning it to the clerk.

The order of the judge refusing to set aside the sale upon this petition must be

Affirmed.

JOHN VAN DYKE v. CHADWICK-HOSKINS COMPANY.

(Filed 7 May, 1924.)

Negligence—Employer and Employee—Damages—Proximate Cause—Intervening Cause—Indictment.

In an action to recover damages by an employee of a corporation on the ground that defendant's vice-principal sent him with a message to another and dangerous employee, unknown to plaintiff at the time, which resulted in the plaintiff knocking him down in self-defense and killing him, and being tried for manslaughter and acquitted: *Held*, the plaintiff's humiliation and expense in being indicted are too remote for a recovery of damages, and the State alone being an independent and intervening cause of the indictment, the proximate cause of the damages alleged was not that of the defendant, and a judgment as of nonsuit on the evidence, on defendant's motion under the statute, was properly allowed.

CLARKSON, J., did not sit.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1923, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury.

From a judgment of nonsuit, entered on motion of the defendant after the plaintiff had introduced his evidence and rested his case, plaintiff appeals.

J. F. Flowers for plaintiff.

Tillett & Guthrie for defendant.

STACY, J. There was allegation and evidence tending to show that plaintiff, an employee in defendant's cotton mill, was instructed by W. M. Kirby, an overseer with authority to give such direction, "to go to the weave room and get the air hose and come by the machine shop and tell Mr. Blackwell to turn on the air in the card room." It was Blackwell's duty to turn on the air when so requested. Plaintiff sought to show that Blackwell bore the reputation around the mill of being an erratic and dangerous man, and that this was unknown to him at the time. When plaintiff delivered his message, it seemed to irritate Blackwell; he began cursing the overseers, ordered plaintiff out of the machine shop and advanced towards him in a threatening attitude with a piece of gearing in his hand. In consequence of this conduct plaintiff struck Blackwell in the mouth with his fist and knocked him to the concrete floor. From the injuries thus received, Blackwell died that night. The plaintiff was a young, strong, vigorous man, while Blackwell was frail and delicate, 65 years of age, and weighed about 85 pounds.

As a result of Blackwell's death, the plaintiff was arrested and tried for manslaughter. The jury returned a verdict of "not guilty." Plaintiff brings this suit to recover damages of the defendant for time lost, humiliation suffered on account of being put in jail and tried for manslaughter, lawyer's fees and other like charges arising, as he alleges, out of his being indicted and tried for the killing of Blackwell.

There is no allegation or evidence tending to show that the defendant had anything to do with plaintiff's arrest, or subsequent indictment and trial. The action is not for false arrest or malicious prosecution, but plaintiff seeks to recover damages by reason of the defendant's alleged negligence in sending him into a known place of danger.

The specific alleged negligent act of which the plaintiff complains is that Kirby instructed him to go to the machine shop of the defendant's mill and tell Blackwell to turn on the air in the card room; that Kirby, with knowledge of Blackwell's reputation of being "an erratic and dangerous man," failed to notify plaintiff of this circumstance, and that said conduct on Kirby's part was such negligence as entitles the plaintiff to maintain this action against the defendant.

The only concrete evidence tending to show Blackwell's reputation was that on one occasion when Kirby went to the machine shop Blackwell talked to him in a manner "not proper to the occasion"; and at another time he made a demonstration towards Mr. Whitaker, a coemployee, and laughingly put a handful of iron shavings in his collar. Kirby said he sent the plaintiff down to the machine shop to keep from going himself because he had had trouble with Blackwell three days before.

It will be observed that the plaintiff was not injured by Blackwell; he had no trouble in defending himself; his arrest and subsequent trial were not brought about at the instigation of the defendant, but this was done by the State, an intervening, independent agency. We think the defendant's motion for judgment as of nonsuit was properly allowed.

In order to establish a case of actionable negligence in a suit like the present, the plaintiff must show, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances when charged with a like duty; and second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 41.

We think the damages sought to be recovered by the plaintiff are too remote, even if Kirby were negligent in giving the order in question, which is not conceded. In *Johnson v. R. R.,* 184 N. C., p. 104, the pertinent rule is stated by *Walker, J.,* as follows: "The rule in actions *ex delicto* is that the damages to be recovered must be the natural and proximate consequence of the act complained of. This is the rule when no malice, fraud, oppression, or evil intent intervenes. The damages which may be considered as arising naturally, according to the usual course of things, from the breach of the contract, are substantially the same as damages which are the natural and proximate consequences of the wrong complained of. 'There is one principal difference in the element of damages obtaining in breach of contract and consequential damages arising from a tort. In the one case damages are recovered, as a rule, on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other on the facts existent, or as they reasonably appeared to the parties at the time of the tort committed.' *Peanut Co. v. R. R.,* 155 N. C., 152."

The record presents no reversible error, hence the judgment of nonsuit entered below must be upheld.

Affirmed.

CLARKSON, J., did not sit.

STATE v. H. H. YOUNG.

(Filed 7 May, 1924.)

Fires—Criminal Law—Evidence—Motive—Landlord and Tenant—Automobiles—License—Identification.

Upon the trial of defendant for setting fire to his tenant's house at night, evidence *held* sufficient to sustain a verdict of guilty which tended to show ill-will on the part of the defendant for his tenant, that an automobile was seen about the time of the fire in front of the tenant's house, afterwards identified as that of the defendant by the peculiar marking of the imprint on the ground of its tires, and by the license number; and testimony of witnesses was properly admitted which tended to show that by experiments made shortly thereafter a witness to the fact could have seen the number on the car under the circumstances, and that the imprint of the tracks of defendant's automobile were identical with those made by the one the witness had seen there when the experiments were made, in the absence of defendant and without having notified him to be present.

APPEAL by defendant from *Long, J.*, at September Term, 1923, of ROWAN.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. F. Hudson and R. Lee Wright for defendant.

CLARK, C. J. The defendant was convicted of burning a dwelling-house in the possession of W. H. Wilson, his tenant. The house was situated seven or eight miles south of Salisbury on the public road. It was burned Saturday night, 24 March, 1923, between 8 and 9 o'clock. The evidence showed that the defendant and his said tenant were on very unfriendly terms, and that the defendant had made threats against tenant and had brought summary proceedings in ejectment before a justice of the peace shortly before the burning, in which the defendant had lost. There was evidence that the defendant knew that neither Wilson nor any member of his family were in the house; that they usually slept there in the daytime and worked at night in Spencer. The house was insured.

The evidence connecting the defendant with the crime was circumstantial. It was in evidence that a car was seen parked at about the time of the fire on the road near the building by one Holshauser, who testified that in turning the bend of the road the lights of his automobile flashed upon this parked machine and that he saw the number—No. 129,295. He was corroborated by Sam Cooper who testified that Holshauser told him the incident three days later, and that this was the

number on the car. There were other witnesses who testified that this was the number on the car belonging to the defendant. The State corroborated Holshauser by witnesses who described, as he did, the track made by this automobile, that one wheel made the impression of a "V" and that the other wheels made normal tracks. He and others testified that they went the next day to where it had been parked and found it made such tracks. The testimony of the State was that the tracks made by the defendant's car made exactly the kind of track Holshauser testified was made by this parked vehicle.

There was evidence that an experiment was made by Holshauser in the car in which he was riding by which he flashed the light at the same turn in the road and that it was sufficient to read the number of the car standing where this car had stood on the night in question. There was also evidence that there was an oil can in a bush near the burned house which was identified as the property of the defendant.

There was also evidence that the tracks leading up the lane to the house and in the direction of the automobile corresponded with the measurement of the tracks made by the defendant.

The defendant excepted to the evidence of the measurements and comparison of the tracks of the automobile, and of the experiments as to flashing a light on an automobile parked where Holshauser said this was parked, and the ability to read the number of the machine.

In *S. v. Morris,* 84 N. C., 756, the Court said: "We know of no principle of law or rule of evidence in which the testimony offered by the State in regard to the examination of the tracks and boots of the prisoner should have been excluded because made in the absence of the prisoner or without notice to him to be present. The counsel who argued the case here for the prisoner cited us to no authority in support of the position, and it is difficult to conceive that any such could be found. . . . The prisoner's counsel did not strenuously urge this point upon the court, but laid the stress of his argument upon the incompetency of the evidence in relation to the tracks, and their correspondence with the prisoner's boots, because it did not appear that the witnesses who testified to those matters were experts, or acquainted with the tracks of the prisoner. . . . But it has been so frequently and so recently decided by this Court, and so clearly taught in all the elementary authors, that it is not necessary that a witness should be an expert to entitle him to testify as to the identification of tracks, and their correspondence with the shoes that may be worn by parties on trial, as to leave it no longer an open question."

The competence of the evidence of the measurements of the tracks was held competent also in *S. v. Freeman,* 146 N. C., 618; *S. v. Reitz,* 83 N. C., 634; *S. v. Graham,* 74 N. C., 646; *S. v. Daniels,* 134 N. C.,

641; *S. v. Martin,* 173 N. C., 808; *S. v. Adams,* 138 N. C., 691-696; *S. v. Griffith,* 185 N. C., 759.

In *S. v. Freeman,* 146 N. C., 615, the witness followed the cart tracks to within 100 yards of George Freeman's house, and the same men's tracks that had come from the store by the side of cart track, and then followed the mule track a quarter of a mile farther, to Frank Freeman's house; followed the man's track 100 yards on from cart track to George Freeman's house. The same ruling would apply to the tracking of an automobile, especially when the track had a peculiarity, as in this case.

It appears from the testimony in this case that the defendant's car made three tracks alike, but one rear wheel made a "V" shape in the ground, and when defendant's automobile was seen in Salisbury it had on it three tires of the same kind and the same rear tire made a "V" in the ground, just such marks as were made by the automobile parked on the side of the road the night the house was burned.

Experiments to corroborate the testimony of the witness Holshauser were competent, 22 C. J., 755, 759, and numerous authorities there cited from many States. The same character of evidence was sustained in *Cox v. R. R.,* 126 N. C., 105; *Arrowood v. R. R., ibid.,* 632. In the latter case exactly similar evidence of experiments with headlights was held competent.

The charge was elaborate and the defendant takes no exception to any part of it. The defendant had a fair trial, and the jury convicted him upon the evidence which, we think, justified the verdict. It was a question of fact for the jury, and they have determined the fact adversely to the defendant. We find

No error.

J. W. GARRISON v. J. F. McGIMPSEY.

(Filed 7 May, 1924.)

Contracts—Evidence—Legal Sufficiency.

To sustain an action upon contract the plaintiff's evidence must be sufficient in law to show the mutual agreement of the minds of the parties upon the subject-matter. *Overall Co. v. Holmes,* 186 N. C., 431, cited and approved as to the definition of a contract.

APPEAL by defendant from *Long, J.,* and a jury, at January Special Term, 1924, of BURKE. Civil action.

Avery & Hairfield for plaintiff.
Avery & Ervin and Spainhour & Mull for defendant.

CLARKSON, J. From a careful examination of the entire evidence, as appears from the record in this case, we are of the opinion that there is no sufficient evidence to be submitted to the jury that there was a contract for the lease of a piece of land for the use of which plaintiff sued the defendant.

We find no error in the charge of the court below as to what constitutes in law a contract. The charge is in accordance with the decisions of this State. We are of the opinion that there was no sufficient evidence to be submitted to the jury that a contract existed between the parties.

This Court, citing many cases, in *Overall Co. v. Holmes,* 186 N. C., 431, defines a contract as follows:

"A contract is 'an agreement, upon sufficient consideration, to do or not to do a particular thing.' 2 Blackstone Com., p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. 'A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequence are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree.' "

For the reason stated there must be a

New trial.

A. H. WEEDON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 May, 1924.)

1. Appeal and Error—Certiorari—Motions—Record Proper.

The Supreme Court will not assume that an appeal has been taken in the Superior Court, in the absence of the filing of the record proper or adequate certification from the clerk of the court to that effect.

2. Same—Procedure.

In order to have the Supreme Court exercise its discretionary power to grant the writ of *certiorari,* which is not controlled by the agreement of the parties, the appellant is required to make his motion therefor not later than the call of his district, and in conformity with the rules of the Court.

PETITION for writ of *certiorari,* filed by plaintiff, appellant, on 25 April, 1924.

Rogers & Rogers for petitioner.
Rountree & Carr for respondent.

STACY, J. This case was tried in the Superior Court of New Hanover County of the Eighth Judicial District, at the October Term, 1923, and resulted in a judgment of nonsuit. Notice and entries of appeal were duly noted at said term, and statement of case on appeal to this Court was being prepared by plaintiff's counsel, J. Felton Head, when he was suddenly taken ill and died 27 February, 1924.

Upon the call of the docket from the Eighth Judicial District on 18 March, 1924, plaintiff filed a motion in this Court, asking that he be allowed until the Fall Term, 1924, within which to perfect his appeal. This motion was denied because the record proper had not been docketed here, and there was nothing in this Court upon which the motion could be predicated. Appellate courts, in the absence of the record proper or adequate certificate from the clerk, will not assume that a given case has been instituted in the trial court.

The present application for a writ of *certiorari* is based upon a transcript of the record proper, filed in this Court on 25 April, 1924, but the application must be denied as it was not made in apt time. This should have been done not later than the call of the docket from the Eighth Judicial District, as the case comes from that district. Speaking to a similar question in *Mimms v. R. R.,* 183 N. C., 436, it was said that a case tried in the Superior Court at the April Term, 1921, should have been docketed in this Court and heard at the Fall Term, 1921, "or at least the record proper should have been seasonably docketed here and motion duly made for a *certiorari.* This latter writ is a discretionary one, and counsel may not dispense with it by agreement."

This disposition of plaintiff's petition will work no great hardship upon him, in the instant case, as it appears that the suit was brought *in forma pauperis,* and the year within which another suit may be brought after nonsuit has not yet expired.

Petition denied.

SEABOARD AIR LINE RAILWAY COMPANY v. CITY OF MONROE AND JAMES McNEELY, CITY TAX COLLECTOR.

(Filed 7 May, 1924.)

THIS is a civil action for permanent restraining order, heard before *Shaw, J.,* at February Term, 1924, of UNION. Appeal by plaintiff.

J. F. Milliken for plaintiff.
Parker & Craig for defendant.

CLARKSON, J. For the reasons given in the case of *J. T. Shute v. City of Monroe and James McNeely, City Tax Collector,* the judgment of the court below dissolving the restraining order against the city of Monroe and James McNeely, city tax collector, and refusing a permanent restraining order or injunction, and dismissing plaintiff's action, was correct, and the judgment rendered in the above case is hereby

Affirmed.

MONROE ICE AND FUEL COMPANY v. CITY OF MONROE AND JAMES McNEELY, CITY TAX COLLECTOR.

(Filed 7 May, 1924.)

THIS is a civil action for permanent restraining order, heard before *Shaw, J.,* at February Term, 1924, of UNION. Appeal by plaintiff.

J. F. Milliken for plaintiff.
Parker & Craig for defendant.

CLARKSON, J. For the reasons given in the case of *J. T. Shute v. City of Monroe and James McNeely, City Tax Collector,* the judgment of the court below dissolving the restraining order against the city of Monroe and James McNeely, city tax collector, and refusing a permanent restraining order or injunction, and dismissing plaintiff's action, was correct, and the judgment rendered in the above case is hereby

Affirmed.

STATE v. RUBE BARBEE.

(Filed 14 May, 1924.)

1. Constitutional Law—Contracts—Imprisonment—Debt—Statutes—Innkeeper—Boarding Houses.

The misdemeanor prescribed by C. S., 4284, for one who obtains lodging, food, or accommodations from an inn, boarding or lodging place, expressly applies, by the expression of the statute, when the contract therefor has been made with a fraudulent intent, and this intent also exists in his surreptitiously absconding and removing his baggage without having paid his bill, and this statute is not inhibited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment.

2. Same—Evidence.

In order to convict under the provisions of C. S., 4284, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense.

APPEAL by defendant from *Harding, J.*, at January Term, 1924, of CABARRUS.

Indictment for wrongful and unlawful failure to pay a board bill to one Mrs. Cline, and for surreptitiously removing baggage from the boarding house of prosecutrix without paying his board bill. There was verdict of guilty, and from judgment thereon defendant appealed, assigning for error the refusal of his Honor to discuss the case at the close of the State's evidence as in judgment of nonsuit.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Maness & Sherrin for defendant.

HOKE, J. Our Constitution, Article I, section 16, provides that there shall be no imprisonment for debt except in cases of fraud, and the authoritative cases construing this and other like sections here and elsewhere are to the effect that the inhibition extends to imprisonment for the mere nonpayment of a debt either in a civil action or by indictment involving the power to imprison. *Minton v. Early,* 183 N. C., 200; *S. v. McRae,* 170 N. C., 712; *S. v. Griffin,* 154 N. C., 611; *S. v. Williams,* 150 N. C., 802; *Bailey v. State of Alabama,* 219 U. S., 219.

The statute under which the indictment is drawn, C. S., 4284, makes it a misdemeanor for one to obtain lodging and food or accommodation at an inn or boarding house or lodging house without paying therefor, with intent to defraud, or who obtains credit at such houses by any false pretense, or who, after obtaining such credit or accommodation at these places, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation, etc.

It is clearly drawn in deference to the Constitutional provision above cited, and has been directly approved in *S. v. Hill,* 166 N. C., 298, on the ground that in order to a conviction under it there must have been

fraud or false pretense in the making of the contract, or that a defendant should have absconded and surreptitiously removed his baggage without paying his bill, both being terms indicating a fraudulent purpose, and in several other decisions presenting the question, it has been held that the penalty of imprisonment could not be imposed for the mere failure or refusal to pay, under this or any statute of similar import.

Thus, in *Minton v. Early, supra,* it was said: "But in our opinion the statute referred to, imposing as it does the punishment of fine and imprisonment for abandoning a tenancy or crop, without paying for the advances made by the landlord, and without requiring any allegation or proof of fraud, either in the inception or breach of the contract, is in violation of our Constitutional provision, Article I, section 16, which inhibits 'imprisonment for debt except in cases of fraud.' This has been virtually held in *S. v. Williams,* 150 N. C., 802, wherein the Court decides, the present *Chief Justice* delivering the opinion, that without averment of fraud, a bill of indictment under this section, then Rev., 3366, should be quashed. And, for the same reasons, the clause of the statute making it indictable for a landlord to fail and refuse to furnish advancements as per agreement is an invalid provision, for, without either averment or proof of fraud, both are ordinary breaches of contract, for which the parties charged may only be held for the civil liability. A similar decision appears in *S. v. Griffin,* 154 N. C., 611, where a conviction, under C. S., 4281, Rev., 3431, for obtaining money, etc., under a promise to begin certain work, and wilful breach, was set aside for lack of any proof of fraud in the transaction other than the obtaining of the advances under the promise to begin the work and a failure to comply. And the same general principle is approved and applied by the Supreme Court of the United States in *Bailey v. Alabama,* 219 U. S., 219, a decision which this Court recognized as controlling in the *Griffin case, supra.*"

And in *S. v. McRae, supra,* after setting aside a conviction under the present statute on the grounds that the prosecutrix was not maintaining a boarding house within the meaning of the statute, the opinion closes with the additional reason, as follows: "There is also another fatal objection to maintaining the prosecution, and that is, a failure to pay is not sufficient evidence of an intent to defraud," citing *S. v. Griffin,* 154 N. C., 611. *S. v. McRae* being a case where a defendant, having boarded with the prosecutrix for nine weeks, under a promise to pay $2.50 per week, left without making any payment.

Considering the record in view of these and similar cases, we are of opinion that the conduct of defendant was not such as to justify or

permit the inference of criminality as defined and contemplated by the statute. The prosecutrix, the only witness for the State, testifying in chief as follows:

"Rube Barbee and his wife boarded with me. His wife came on 6 January and stayed until about 11 May. He worked at the mill and then he quit. He didn't exactly leave. He came back to get his meals. His wife said to him, 'Rube, you are going to leave the job and you can't pay Mrs. Cline.' And he said, 'You never mind, I will pay Mrs. Cline for my board if I don't work.'

"I told him I was living in the company's house and keeping boarders who worked in the mill. He said, 'I will be in Saturday morning and pay your board.' He always stayed out late, and I never saw him until two weeks after that. His wife went to her father's and brought Rube back home with her Sunday evening. He went in the mill Monday morning and they paid him up, and he said, 'They paid me up this morning and I will have to leave and go off and hunt a job. I will leave you $5 at the cafe or the barber shop.' I sent the little boy and got that. He said, 'Mrs. Cline, I will give you a written order to show you that I will pay you $25 the 25th day of February, and the balance in two weeks.' When he left his bill was $62.

"He went off and left his wife and two children with me. They stayed there from 15 February until about 11 May. He never did come back to pay me. His wife stayed there for about six weeks after Rube left before going to work, and she went to Concord and took out a warrant for Rube. Rube did not come back. She stayed after that until about 11 May. He did not pay her board or his. When his wife left she went to the trunk; she was going to her father's; she took away all the clothes that were fit to wear, and went to Rube's trunk and carried them off too. Rube did not come back to pay me. He never sent me any more money.

"His wife paid her board after she went to work, and paid while she was working. Rube Barbee owes me $102 for himself and children. He sent me a money order for $2 on board and said, 'I will pay you a little along until I get you paid.' He has never paid me any more. This was last July."

And from this, the only testimony offered, we find nothing beyond a failure or refusal to pay the debt, and as to taking away the clothes of defendant, which seems to have chiefly inspired the prosecution, that was done by his wife, and there is no evidence whatever that defendant either advised or procured it or that he had any knowledge of it. The last heard of the two, she was having him prosecuted for nonsupport, and there is nothing in the record to show that the wife took the clothes to him or that they have ever renewed their marital association.

As to defendant himself, when he lost his place at the mill and went away, avowedly to seek another job, he paid $5 on account and gave her a written acknowledgment of the debt, and has since sent her $2 on it with a renewed promise of eventual payment. So far as he was concerned, he went away with nothing but what he was then wearing, leaving trunk and clothes at the boarding house, and there is not a particle of evidence to show that he has ever received either, or that he had anything to do with their removal.

On the facts presented we are of opinion, as stated, that the motion for nonsuit should have been allowed and the prosecution dismissed.

Reversed.

MAYS MILLS v. LAWRENCE McRAE.

(Filed 14 May, 1924.)

1. Vendor and Purchaser—Contracts—Performance—Bargain and Sale.

Where the acceptance of an offer of purchase of cotton at the then market price is made conditional upon the prompt action of the proposed purchaser in examining samples sent him, with no time limit definitely fixed, and there is evidence of his delay on a rising market beyond a reasonable time in which such purchaser could have acted, the question as to whether there was a complete contract of bargain and sale is one for the jury, and defendant's motion as of nonsuit thereon should be denied.

2. Same—Damages.

Ordinarily, the measure of damages caused by the vendor's breach of contract in failing to deliver cotton to the vendee, on a rising market, is the difference between the contract price and the reasonable market price at the time when and at the place where the cotton should have been delivered, according to the time fixed therefor by the terms of the contract.

3. Same—Minimizing Damages—Evidence—Burden of Proof.

Where, upon a rising market, there is no definite time fixed for the acceptance by the purchaser of cotton at the price at the time of the offer, and the question of the reasonableness of the time of the acceptance arises in the case, upon notice at a later time by the seller that he regarded the proposal of sale at an end for failure of acceptance, and that he would not ship the cotton at the price named, it is required of the proposed purchaser, in the exercise of ordinary care and prudence, that he minimize the loss of the proposed seller by buying the cotton, of the same quantity and grade, at the price prevailing on the open market after the time of notice given, with the burden of proof in this respect upon the proposed seller that he could reasonably have done so.

APPEAL by defendant from *Harding, J.*, at December Term, 1923, of GASTON.

Civil action to recover damages for an alleged breach of contract in connection with the sale of 50 bales of long-staple cotton.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Garland & Austin and Mason & Mason for plaintiff.
Woltz & Woltz and Geo. W. Wilson for defendant.

STACY, J. There was evidence tending to show that on 28 April, 1922, in response to defendant's inquiry, the plaintiff offered by letter written from Gastonia, N. C., to buy from the defendant, who lived in Greensboro, N. C., 50 bales of long-staple cotton on the basis of "today's market of 25 cents," delivery to be made at Cramerton, N. C. Defendant accepted this proposition by wire on the following day and mailed samples in accordance with understanding. Correspondence ensued between the parties, and on 9 May defendant wrote the plaintiff as follows:

"I have your letter of the 8th, also your letter of the 5th. Your proposition of the 28th was to buy the 50 bales at 25 cents landed on the then existing market levels.

"I forwarded the samples and wrote you on the second to look them over and advise by wire.

"Not hearing from you, I concluded that you were not interested, and also, in the meantime, the market moved off the levels on which you made the offer, so automatically the proposition was killed.

"On the 5th I wrote and made a price based on July. I will be glad to confirm a sale to you at 725 on July for the 50 bales if unsold. This is splendid value, and it now looks like the staple cotton is going to be considerably dearer."

Without setting out the facts in full, some of which are in dispute, we are satisfied, from a careful perusal of the record, viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, that his Honor was correct in submitting the case to the jury for them to say whether or not the parties had entered into a binding contract of bargain and sale. But as a new trial is to be awarded, we refrain from a discussion of this phase of the evidence.

There was a constant and steady rise in the market at this time, until cotton of the grade here in question reached its highest price of 33 cents on 18 May, and 33 or 34 cents on 23 May. It was something less than 26 cents on 9 May. Nothing was said as to when delivery should be made, and it was in evidence by plaintiff's witnesses that cotton shipped from Greensboro to Cramerton would ordinarily arrive within 7, 10 or 14 days, and one witness said from 3 to 4 weeks. His Honor instructed the jury that the measure of damages would be the difference

between the contract price and the reasonable market price at the time when, and at the place where, the cotton should have been delivered, and added further that, "although notice has been given by the seller of his intention not to deliver according to contract, the market price as of the date when the delivery should have been made will be taken, and not the market price on the date of such notice."

This is undoubtedly the general rule, especially where the goods are to be delivered at a specified time and place, and where no time is fixed by the contract, the delivery is to be made within a reasonable time. 35 Cyc., 637; *Kipp v. Wiles,* 3 Sandf. (N. Y.), 585; *Mfg. Co. v. Solomon,* 178 Mass., 582; 2 Benjamin on Sales, 1141.

But this general rule is subject to modification where the defendant, as in the instant case, offers evidence tending to show notice to the plaintiff that the goods will not be shipped according to the contract, and that thereafter the plaintiff had an opportunity to minimize its loss by going into the market and purchasing other similar goods. Benj. on Sales, sec. 1333. This appears to be a very just rule where no time for delivery of the goods is fixed by agreement of the parties. The "reasonable time" allowed by law in such cases is primarily for the benefit of the vendor, and there would seem to be no good reason why, upon notice from the seller to the buyer that the goods will not be shipped, the vendee should not be required to exercise ordinary care and prudence to avoid loss or to lessen the damages resulting therefrom.

When a party breaches his contract without any valid excuse, the courts are not inclined to permit him to prescribe the rights of the innocent party, but their chief concern is in making the plaintiff whole and securing to him his rights under the contract. *Register Co. v. Hill,* 136 N. C., 277; *Smith v. Lumber Co.,* 142 N. C., 26. Nevertheless, it is a sound principle of law, and certainly approved in morals, that one who is injured in his person or property by the wrongful or negligent act of another, whether arising *ex delicto* or *ex contractu,* is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Adv. Co. v. Warehouse Co.,* 186 N. C., 197; 8 R. C. L., 442; 24 R. C. L., 85. "The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence require to minimize the loss"—*Hoke, J.,* in *Yowmans v. Hendersonville,* 175 N. C., p. 579, citing a number of authorities in support of the position. The defendant was denied the benefit of this principle under his Honor's charge, and for this reason we are of opinion that a new trial must be awarded.

Of course, unless the defendant is able to show that the plaintiff could have easily procured cotton of similar quantity and quality in the open market, and thus saved itself from partial or total loss resulting from the defendant's default, damages should be awarded under the general rule, and not under the modification to the rule as just stated. It would seem to be more in accord with fairness to require the defaulting seller—the party charged with responsibility for breach of the contract—to prove that similar goods could have been readily procured in the market than to require the vendee to show that like goods could not be obtained in the market. *Mercantile Co. v. Lusk,* 45 Kan., 182; Benj. on Sales, sec. 1333; *Campfield v. Sauer,* 189 Fed., 576; 38 L. R. A. (N. S.), 837.

New trial.

IN RE MAY BUDGET OF THE BOARD OF EDUCATION OF YADKIN COUNTY.

(Filed 14 May, 1924.)

Schools — Salaries — Statutes — Counties — Trial by Jury—Appeal and Error.

Under the provisions of chapter 136, Public Laws 1923, a method is fixed whereby, upon disagreement as to the amount of salary fund between the county board of education and county commissioners, the matter be referred to the clerk of the Superior Court of the county, with right of appeal to the judge: *Held,* error for the latter to refuse the motion of the board of county commissioners for a jury trial thereon, as expressly provided by section 188 of said chapter.

APPEAL by the county commissioners of Yadkin and the board of education of said county from *Webb, J.,* at March Term, 1924, of YADKIN.

This is a controversy between the county commissioners of Yadkin and the board of education of said county to settle the matters in controversy between said boards over the May budget for the school year 1923 under chapter 136, Laws 1923. All matters in controversy between said boards have been settled by agreement except one item of salary fund, to wit, the salary to be paid the Superintendent of Public Instruction of Yadkin County. The board of education fixed the salary of said superintendent at $3,000. The commissioners of Yadkin made exception to the same, thinking that it was unreasonable, and presented a counter-budget in which the salary of the superintendent was fixed at $2,000 per year.

The matter was referred to the clerk of the Superior Court as provided by section 187, p. 50, of the Public School Law. The board of education protested against the said reference to the clerk, who rendered his award, fixing the salary at $2,600 and $400 for expenses. From such decision both boards appealed to the judge of the Superior Court, the county commissioners demanding that the issue be decided by a jury and the board of education insisting that it was not subject to jury trial. The court, upon the facts agreed, refused a jury trial and affirmed the judgment of the clerk, and both sides appealed.

Attorney-General Manning, Assistant Attorney-General Nash, J. H. Folger, and D. M. Reece for county board of education.

Williams & Reavis and Holton & Holton for board of commissioners.

CLARK, C. J. The school law provides: "Sec. 175. *The Contents of the May Budget.* The May budget prepared by the county board of education shall provide three separate school funds: (*a*) a salary fund, (*b*) an operating and equipment fund, and (*c*) a fund for the repayment of all notes, loans and bonds.

"(*a*) The salary fund shall include the salaries of all superintendents, principals, supervisors, teachers of all sorts, the per diem of the county board of education, and the salaries of all other officials authorized by law."

Section 187 provides that in the event of a disagreement between the county board of education and the board of county commissioners as to the amount of salary fund or the fund necessary to pay interest and installments on bonds, notes and loans, the county board of education and the board of county commissioners shall sit in joint session and each board shall have one vote on the question of the adoption of these amounts in the budget. A majority of the members of each board shall cast the vote for each board. In the event of a tie, the clerk of the Superior Court shall act as arbitrator upon the issues arising between said two boards, and shall render his decision thereon within ten days. But either the county board of education or the board of county commissioners shall have the right to appeal to the Superior Court within thirty days from the date of the decision of the clerk of the Superior Court, and it shall be the duty of the judge hearing the case on appeal to find the facts as to the amount of the salary fund and the fund necessary to pay interest and installment on bonds, notes and loans, which findings shall be conclusive.

"Sec. 188. *Commissioners May Demand a Jury Trial.* The county commissioners shall have the right to have the issues tried by a jury as to the amount of the teachers' salary fund and the operating and equip-

ment fund, which jury trial shall be set at the first succeeding term of the Superior Court, and shall have precedence over all other business of the court."

Following the case of *Board of Education v. Comrs.*, 182 N. C., 571, in which this Court held that the provision of the school law providing for the judge to pass upon certain issues of fact was constitutional, the Legislature then in session passed an act, chapter 93, Extra Session 1921, providing, "The issues raised shall be tried by a jury at the first succeeding term of the Superior Court, and shall have precedence over all other business of the court."

Section 187 of the school law provides that any disagreement that might arise between the board of education and the board of county commissioners in making up the school budget shall be settled by the clerk, and further provides either party can appeal from his decision; and section 188 provides for a trial by jury of the issue in question.

It is to be noted that section 175 provides for a salary fund, expressly naming and defining what shall be included under the budget of salary fund, and names "all superintendents."

We think that under the words of the statute the board of commissioners have the right under this statute to have the issue as to the superintendent's salary tried by a jury, and the judge was in error in refusing to submit the same.

Reversed.

W. E. GLADSTONE v. M. M. SWAIM.

(Filed 14 May, 1924.)

Gaming—Money Received—Contracts—Stocks—Margin—Actions.

Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased: *Held*, the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and C. S., 2144, relating to gambling, etc., is not available to the defendant as a defense.

APPEAL by defendant from *Lane, J.*, at September Term, 1923, of FORSYTH.

Civil action, to recover of the defendant moneys belonging to the plaintiff, and which, it is alleged, the defendant converted to his own

use. It is further alleged that the defendant obtained a part of the funds, sought to be recovered, by false and fraudulent representations. Defense interposed upon the ground that the funds in question were obtained in connection with a gambling transaction, in violation of C. S., 2144.

There was a judgment of nonsuit in the Forsyth County Court; this was reversed on appeal to the Superior Court and the case remanded to the County Court for trial. From this judgment and order of the Superior Court the defendant appeals.

Parrish & Deal for plaintiff.
Swink, Clement & Hutchins for defendant.

STACY, J. The evidence, taken in its most favorable light for the plaintiff, the accepted position on demurrer or motion to nonsuit, tends to establish the following facts:

On 7 February, 1920, the defendant, who had been buying and selling stocks, through a broker in New York, came to the plaintiff, his intimate friend, and advised him to purchase some stock in the Willys-Overland Company, stating that it would pay six or eight per cent in dividends, with a chance for the stock to increase in value. The defendant told the plaintiff that he would not have to pay for the stock outright; that he could buy it on the defendant's credit and in his name; that the defendant's broker in New York, Joseph Walker & Son, would carry it upon an advanced payment of one-third of the market price, and that the plaintiff could hold the stock until the dividends and the increased value thereof amounted to enough to pay the balance of the purchase price. The plaintiff bought 25 shares of this stock, paid the market price thereof in full, and took it into his possession.

On 19 April, 1920, the defendant again advised the plaintiff to buy 100 shares of Willys-Overland Company stock, and told the plaintiff that if he would pay one-third of the purchase price his broker would pay the balance and hold the stock as collateral. With this understanding, the plaintiff delivered to the defendant his check for $405.00 and the 25 shares of stock already purchased, which was to be held by the broker as collateral for the payment of the balance of the purchase price of the 100 shares of said stock. The 100 shares of stock was actually purchased in the market at $24.25 per share and delivered to the broker.

On 30 April, 1920, eleven days thereafter, the defendant had the broker to sell the 125 shares of plaintiff's stock at $19.50 per share. This sale was made without plaintiff's knowledge or consent. The pro-

ceeds from said sale, after deducting the balance due the broker, left to the credit of the defendant in his account with the broker the sum of $408.75, which rightfully belonged to the plaintiff, and which was converted by the defendant to his own use.

Thereafter, on 30 May, 1920, the defendant came to the plaintiff and, concealing from him the fact that all of his stock had been sold, told the plaintiff that the broker was calling for additional collateral, as the market value of the Willys-Overland Company stock had decreased in value, and asked for $350.00 to prevent its sale by the broker. The plaintiff gave the defendant this amount, relying upon the truth of his statements and believing them to be true. On 5 October, 1920, under the same circumstances, the defendant demanded and received of the plaintiff the further sum of $350.00; and again, on 1 July, 1921, under the same circumstances, the defendant demanded and received of the plaintiff his promissory note for $500.00, the plaintiff not yet knowing that his stock had been sold in April of the previous year. On this note the plaintiff made payments in installments aggregating $350.00 before he discovered the fraud that had been practiced upon him.

The payments obtained by the defendant's false and fraudulent representations, after 30 April, 1920, amounted to $1,050.00, which, added to the sum of $408.75, the proceeds of the stock of the plaintiff sold by the defendant and converted to his own use, make a total of $1,458.75, the amount sought to be recovered by plaintiff in this suit.

At the conclusion of the plaintiff's evidence the County Court dismissed the action as in case of nonsuit, on the ground that the evidence disclosed a gambling contract, in violation of C. S., 2144. On appeal to the Superior Court, this was reversed and the cause remanded to the County Court for trial. From this judgment and order of the Superior Court the case comes to us for review.

If the foregoing be a correct recital of the transactions between the parties, which the jury alone may determine, then C. S., 2144, has no application to the case. *Harvey v. Pettaway,* 156 N. C., 375; 27 C. J., 1053; 12 R. C. L., 752. From the plaintiff's viewpoint, the action is one for pure fraud and conversion. The judgment and order of the Superior Court must be upheld. As the case goes back for another trial, we refrain from any discussion of the evidence. The defendant's testimony may tend to show a different state of facts.

Affirmed.

STATE v. L. W. ARROWOOD.

(Filed 14 May, 1924.)

Criminal Law—Statutes—Infanticide—Homicide—Concealment of Birth of New-born Infant—Burying—Evidence—Presumption—Burden of Proof—Directing Verdict—Appeal and Error.

Under the provisions of C. S., 4228, making it a felony for any person to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt.

APPEAL by defendant from *Ray, J.*, at October Term, 1923, of RUTHERFORD.

Criminal prosecution, tried upon an indictment charging the defendant with endeavoring to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, in violation of C. S., 4228.

The State offered four witnesses, who testified in effect that Bonnie Arrowood gave birth to a child on Sunday night, 5 August, 1923. On Tuesday following, this fact was discovered by the county physician, after he had been called to make an examination of the said Bonnie Arrowood. The defendant testified before the coroner's jury that he knew nothing of the infant until he found its dead body in the field, about 100 yards from the house, late Thursday evening, 9 August, and, on account of its decomposed condition, he put it in a tow-sack and buried it. On the following morning the defendant reported the finding of the body to Ike Flack, postmaster at Thermal City, and requested him to notify the authorities about it. The defendant showed the coroner's jury where the body was buried and assisted them in digging it up.

The defendant offered no evidence.

Under a peremptory instruction from the court, the jury returned a verdict of "guilty." From a judgment of 5 years at hard labor in the State's Prison the defendant appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Stover P. Dunagan for defendant.

STACY, J., after stating the case: At the close of the evidence, his Honor instructed the jury as follows: "Gentlemen of the jury, if you

believe this evidence, beyond a reasonable doubt, you will return a verdict of guilty. Take the case." The defendant excepts to this instruction, and the same is assigned as error. The exception is well taken, and, under a uniform line of decisions, it must be held for reversible error. *S. v. Murphrey,* 186 N. C., 113; *S. v. Estes,* 185 N. C., 752; *S. v. Alley,* 180 N. C., 663; *S. v. Boyd,* 175 N. C., 793.

The defendant entered on the trial with the common-law presumption of innocence in his favor. His plea of not guilty cast upon the State the burden of establishing his guilt, not merely to the satisfaction of the jury, but beyond a reasonable doubt. The evidence here was not compelling. The jury might have been satisfied, beyond a reasonable doubt, of the truth of all that was said by the witnesses, and yet acquitted the defendant. "If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony," is the language, in part, of the statute under which the defendant stands indicted. C. S., 4228. Furthermore, it is error for the trial court to direct a verdict in a criminal prosecution where there is no admission or presumption calling for explanation or reply on the part of the defendant. *S. v. Hite,* 141 N. C., 769; *S. v. Riley,* 113 N. C., 651.

New trial.

W. W. RHODES v. WADE SHELTON.

(Filed 14 May, 1924.)

Easements—Statutes—Way of Necessity.

For the owner of lands, cultivating the same, to obtain a way of necessity over the lands of another to a public road, he must show that such way is "necessary, reasonable and just," under the provisions of C. S., 3836; and where it appears, without sufficient denial, that there is a public road leading to the cultivated lands, the petition is properly dismissed.

APPEAL by petitioner from *Lyon, J.,* at December Special Term, 1923, of STOKES.

Petition for cartway over lands of respondent, filed before Stokes County Highway Commission and heard *de novo* on appeal to Superior Court.

From a judgment dismissing the petition, entered as in case of nonsuit, the petitioner appeals.

J. W. Hall and Holton & Holton for petitioner.

McMichael & McMichael, J. D. Humphreys, and N. O. Petree for respondent.

STACY, J. Petitioner alleges that he owns and cultivates a certain tract of land to which there is leading no public road, and he asks for the laying-out of a cartway over the lands of the respondent, lying adjacent to and between the petitioner's land and the public highway leading from Lawsonville to Danbury. Respondent files answer, denying the petitioner's right to a cartway as proposed by him, and alleges that the petitioner has a public road leading to and through the land described in the petition, and that he can reach the same by two public roads, from different directions, intersecting with said public road leading to and through his land.

It appearing from the evidence, without any sufficient denial, that there is a public road leading to the cultivated land of the petitioner, and there being no sufficient evidence to show that said proposed cartway is "necessary, reasonable and just," judgment was entered, on motion of respondent, dismissing the petition as in case of nonsuit. In this we find no error. C. S., 3836, and cases cited thereunder. No benefit would be derived from detailing the evidence in full, as the only question before us is whether it is sufficient to carry the case to the jury, and we concur in the opinion of the trial court that it is not.

The judgment of nonsuit must be upheld.

Affirmed.

STATE v. EARLY ASHBURN AND ESSIE HANDY.

(Filed 14 May, 1924.)

1. Jurors—Qualification—Statutes—Challenges.

Where a juror has a civil action calendared for the term and continued in the discretion of the trial judge, it is not objectionable that he be permitted by the court to sit as a juror in a criminal action at the same term, the reason of the statute (C. S., 2316) for the disqualification being removed.

2. Same—Several Defendants—Criminal Law.

Where two or more defendants are being tried for the same crime, and, upon challenge for cause by one of them, the juror is stood aside upon cause admitted by the State, the other defendant who desires the juror to sit has no legal ground of complaint.

3. Same—Homicide—Felonies.

The effect of C. S., 2325, was to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and C. S., 4634, abolishing the established practice

permitting the solicitor to place jurors, upon the trial of a capital felony, at the foot of the panel, does not affect the application of C. S., 2325, to the trial of such felonies.

4. Same—Interpretation of Statutes.

The legislative intent in the enactment of C. S., 4633, providing twelve peremptory challenges for the defendant tried for a capital felony, and in other criminal cases four peremptory challenges, and requiring the clerk to read over beforehand the names of the jurors in the panel, in the presence and hearing of the defendants and their counsel, etc., is to secure a reasonable and impartial verdict.

5. Same—Trials—State's Evidence.

Where the defendant in a criminal action has selected her jury, and thereafter has entered a plea of guilty and become a witness against her codefendant, being tried for the same offense, she is within her statutory right in exercising such right, and her codefendant may not sustain his exception thereto.

6. Appeal and Error—Evidence—Objections and Exceptions.

An exception to testimony excluded by the trial judge is not maintainable unless its relevance or materiality is made to appear in the record on appeal.

7. Evidence—Homicide—Criminal Law—Independent Acts—Motive.

Where there is evidence tending to show that the defendant strangled to death his illegitimate child soon after it was born alive, it is competent to show his intimacy and misconduct with its mother, when relevant, as tending to prove the *quo animo* or guilty knowledge, or motive for the crime.

8. Instructions—Requests—Appeal and Error.

Where the trial court clearly gives in his charge the full substance of a request for instruction, it is sufficient.

9. Instructions—Contentions—Appeal and Error.

An exception to the recital of the contentions of the appellant, contained in the judge's charge, should be taken in time to afford the judge an opportunity to correct them.

10. Homicide—Evidence—Instructions—Appeal and Error.

Where, upon the trial for a homicide, the defendant relies only on his evidence to show an *alibi*, and the State's evidence tends to convict him of murder in the second degree, it is not error for the court below to instruct the jury, as a matter of law, that a verdict of guilty of manslaughter could not be returned by them, there being no evidence thereof.

11. Evidence—Criminal Law—Accomplice—Instructions.

A verdict of murder will be sustained upon the unsupported testimony of an accomplice in the crime when, having been instructed by the judge to receive it with caution, owing to the great interest of the witness, the jury have found it sufficient.

CLARK, C. J., concurring.

STATE *v.* ASHBURN.

CRIMINAL ACTION, heard before *Lane, J.*, and a jury, at October Term, 1923, of SURRY.

Appeal by Early Ashburn.

The defendants were indicted, with Sena Thomas, for the murder of an infant born to the defendant, Essie Handy. A true bill was found against Early Ashburn and Essie Handy, and not a true bill as to Sena Thomas. The defendants Early Ashburn and Essie Handy pleaded not guilty, whereupon a venire was ordered and summoned. After the jury was selected and impaneled, Essie Handy plead guilty of manslaughter, which plea was accepted by the State, and she testified as a witness for the State.

There was a verdict of guilty of murder in the second degree as to Early Ashburn.

From the judgment rendered, the defendant assigned errors and appealed to the Supreme Court. The other material facts and the assignments of error will be considered in the opinion.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Folger for defendant.

CLARKSON, J. The first assignment of error was to the court below denying the defendant Early Ashburn "challenge for cause" as to the juror W. S. Gough. The contention being that he had a case on the docket at issue, and that the rule of the bar, as printed at the foot of the calendar, is that civil cases not calendared may be taken up by consent.

The court, upon objection to the juror, stated that all civil cases not on the calendar are continued, for that it is impossible to try civil cases not on the calendar set for this term. The juror was then challenged peremptorily by the defendant Ashburn.

C. S., 2316, is as follows: "If any of the jurors drawn have a suit pending and at issue in the Superior Court, the scrolls with their names must be returned into partition No. 1 of the jury box."

It is well settled that if a juror has a suit pending and at issue in the Superior Court of the county, he may be challenged for this cause. *S. v. Levy, ante,* 585; *S. v. Hopkins,* 154 N. C., 622; *S. v. Spivey,* 132 N. C., 989; *S. v. Vick,* 132 N. C., 997; *Hodges v. Lassiter,* 96 N. C., 351.

The object of C. S., 2316, is to disqualify one to serve as a juror at the same term that he has *"a suit pending and at issue,"* to be tried at that term, so that he could not associate with the other jurors who might sit on his case. The reason is apparent. *Cessante ratione legis, cessat et ipsa lex.* (The reason of the law ceasing, the law itself ceases also.)

The court below continued the case of the juror. It was not on the calendar and it was impossible to try it at that term. This was in the sound discretion of the court below. *S. v. Hopper,* 186 N. C., 411.

The second, third, and fourth assignments of error were to the court below allowing W. M. Payne, S. A. Johnson, and J. A. Hayes, jurors, to be stood aside. The jurors referred to in these assignments of error were examined as to their qualifications and competency to serve upon the jury by the defendant Essie Handy, they having been passed by the State and by the defendant Ashburn. The counsel of Essie Handy challenged the several jurors for cause, whereupon in each case the solicitor admitted the cause, and the jurors were stood aside.

Section 2325, C. S., provides: "The court or any party to an action, civil or criminal, shall be allowed in selecting the jury to make inquiry as to the fitness and competency of any person to serve as a juror without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged."

Section 4633, C. S., provides: "Every person on joint or several trial for his life may make a peremptory challenge of twelve jurors, and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without cause, four jurors, and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be impaneled to try the issues; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors."

Section 4634, C. S., provides: "In all capital cases the prosecuting officer on behalf of the State shall have the right to challenge peremptorily four jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than four jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of two jurors shall be allowed in behalf of the State for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain, the same shall be inquired of according to the custom of the court."

These sections were part of the amendments made by chapter 31, Public Laws 1913. The first quoted section, to wit, 2325, was plainly intended to eliminate the practice that had grown up prior to 1913, when

the solicitor asked a person called to serve on a jury in a capital felony challenge for cause, counsel of defendants could admit the cause without further question of the juror and the juror would be stood aside. This section provides and gives the right to the State or to the defendant to inquire of the juror as to his fitness and competency to serve, but none of these questions shall be considered a challenge until the party actually and formally challenges the juror. There is no provision in the statute law of the State which prevents the adverse party from, then, when the juror is formally challenged, admitting the cause.

The section above quoted (4634) abolished what had been, up to 1913, a practice employed by the solicitors of standing a certain number of persons at the foot of the panel. But there is nothing in this section which prevents either the solicitor or counsel for the defendant, when a juror is formally challenged, from admitting the cause, and then the juror is stood aside. In this case, as to those jurors, the State passed the jurors; the defendant Ashburn, being first named in the indictment, passed the jurors, but the other defendant in the indictment, Essie Handy, had certainly a right to determine whether the jurors were acceptable to her, and she had a right to challenge the jurors for cause. It seems, under these statutes above quoted, and under the custom of the court, which is provided in section 4634 of C. S., the solicitor had a right to admit the cause. Ashburn could not object. It seems that in this particular case, according to the record, the defendant obtained advantage in selecting the jury by this same practice. Jurors J. E. Southern and R. J. Williams were challenged for cause by defendant Ashburn, and the cause admitted by the State, and the jurors stood aside.

Section 4633, *supra,* allows each defendant twelve peremptory challenges—three times more than the State. The intent of the law is to secure a jury that will render a fair and impartial verdict.

The assignment of error No. 5 is untenable, from the view we take of the before mentioned assignments. F. C. Sprinkle, a juror, was challenged for cause by defendant Ashburn. No cause found, whereupon Ashburn, having exhausted all his peremptory challenges, asked the court to stand the juror aside. The court refused. The juror was tendered to the defendant Ashburn, who, through his counsel, in answer to the question, "Do you like him," answered "No." The juror was not stood aside, but tendered to and accepted by the defendant Essie Handy. The juror, having been passed by the State, was sworn and served on the panel.

It appears that Essie Handy remained as a defendant in the trial of this cause until the jurors were selected before she entered her plea of manslaughter, and was afterwards used as a witness for the State. We

do not think this fact would debar her of the legal rights she had in selecting the jury. It was a circumstance that could be, and no doubt was, commented on to the jury to affect her credibility showing her interest to save herself. But this is a fact we cannot deal with.

We do not think there was any error in the rulings of his Honor constituting assignments of error 6 and 7, for the reason that it does not appear what the witness' answer would have been in either case. The first exception is taken to the question asked R. E. Lawrence, chief of police, to wit, "Did Mrs. Gordy make any statement to you at Mrs. Cook's about the birth of this child?" We understand the rule to be that excluded testimony must be set out and it must appear that it was relevant and material. The question asked the chief of police does not itself convey what the answer would have been, nor does the question constituting the seventh exception carry with it a suggestion of the answer, and there is no statement in respect to either question as to what the answer of the witness would have been. *S. v. Jestes,* 185 N. C., 736; *S. v. McCanless,* 182 N. C., 843; *S. v. Yearwood,* 178 N. C., 813; *S. v. Spencer,* 176 N. C., 709; *S. v. Neville,* 175 N. C., 731; *S. v. Williams,* 168 N. C., 191; *S. v. Dula,* 61 N. C., 437. And the same rule applies in civil cases. *Barbee v. Davis, ante,* 85; *Snyder v. Asheboro,* 182 N. C., 710; *Smith v. Comrs.,* 176 N. C., 466, and numerous other cases.

We have carefully considered assignments 8, 9, 10 (11 abandoned), 12, 13, 14, 15, 16, 17 and 18 and can find no prejudicial or reversible error.

The 19th assignment of error is to the five propositions proposed to be shown by the testimony of Mrs. T. H. Tranum:

1. That the witness saw Frank Hawks alone in the home of Essie Handy at night.

2. That she saw Essie Handy follow Frank Hawks into the privy to the rear of Essie Handy's house at night and remain there for some time.

3. That on another occasion she saw Frank Hawks carrying Essie Handy's baby. This had reference to the first child of Essie Handy.

4. That she had seen them drunk together.

5. That Frank Hawks lived in the same house with Essie Handy; she upstairs and he down. That all of this took place in the year 1922.

In *S. v. Frazier,* 118 N. C., 1258, it is said: "The Court in *S. v. Jeffries,* 117 N. C., 727, said: 'There are some few exceptions to the almost universal rule of law, that evidence of a distinct substantive offense cannot be admitted in support of another offense.' The exceptions to the rule are to be found in those cases in which testimony concerning independent offenses has been admitted because of the necessity

of proving the *quo animo,* or the guilty knowledge of the defendant, and also for the purpose of identification of the defendant." *S. v. Griffith,* 185 N. C., 760.

In *S. v. Davis,* 77 N. C., 483, an opinion written by *Bynum, J.,* it was held that "evidence that a third party had malice towards the deceased, a motive to take his life and an opportunity to do so, and had made threats against him, and that some time before deceased was killed he went in the direction of deceased's house with a deadly weapon, threatening to kill him, was inadmissible." *S. v. Lane,* 166 N. C., 338; *S. v. Fogleman,* 164 N. C., 461.

We have carefully considered 20, 21, 22 and 23 assignments of error, relating to defendant's prayers for instructions. We think the charge of the court below given includes substantially what defendant was entitled to under the law and the facts in the case.

Assignment 24 is to the State's contention given by the court. This cannot be sustained.

In *S. v. Barnhill,* 186 N. C., 450 (and cases cited), it was said: "If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal."

The decision in *S. v. Love, ante,* 37, is not at variance with this, for there the judge placed before the jury in his charge evidence which had been excluded on the examination of the witness and which the defendant had no opportunity to rebut. It was held that this error was not subject to correction under the facts of that case.

The 25th assignment of error was taken to the charge of the court below: "The court charges you as a matter of law there is no evidence of manslaughter, and the defendant could not be found guilty of manslaughter because there is no evidence of it." We can see no error in this charge under the facts and circumstances of this case, or the charge in assignment of error No. 30. The same proposition is presented in assignment No. 30.

The defendant denied all knowledge of the crime and set up as a defense an alibi. The main evidence for the State was Essie Handy. She testified: "Have been knowing Early Ashburn since he has been in Mr. Welch's store. He has all the time sorter talked out of the way to me. I paid no attention to that till in January, be two years this coming January, he offered me $10 and I took him up and went down in the basement. Before that he had not come out plain and said anything. The first time he had improper relations with me will be two years this coming January. This happened in the basement of the

store. All relations occurred in the basement. We then had light signals; he would turn on the light as notice for me to come. He sent me several notes by my brothers. I told him in September there was something the matter with me. We continued the association then for a while. He told me not to tell about my condition. He said he was scared of his wife. I became positive of my condition in October. Told him and he said he would take care of it, and when it was old enough he would adopt it. I worked in the National Furniture Factory. Worked from seven o'clock in the morning until six in the evening. On the day before the birth of the baby that night, I was at the factory. Worked up to the night the baby was born. My mother did not know my condition. My mother went off somewhere and the boys went to the picture show, I reckon; they left. I washed the dishes after supper and put my little boy to bed. I was suffering a great deal. I went to the lower part of the sidewalk and Early Ashburn was on the other side and I called him. He said, go on I will be there directly. I went back; the child was born. He was with me. I heard him say, 'Don't holler.' Do not know whether I was hollering or not. I did not know when the child was born. I did not put the rag in the baby's throat. I did not see anybody in the house except Early."

The child was found about six weeks after the birth in the pit of a toilet of Sena Thomas, mother of Essie Handy, wrapped in a rag or skirt.

Dr. Woltz testified for the State: "I am a licensed practicing physician. The child was a male child. When I saw it it had no clothes on. I discovered a rag in its mouth and pulled it out. The rag was twisted and pushed clear down its throat as far as it could go, and the end was crammed in its jaws. When I pulled it out it left the throat open down to the windpipe, packed in there and on either side, packed in its jaws. The child was fully developed. I think the child was born alive. It was strangled to death. The cord looked like it had been torn off; no ligatures close to the abdomen. The child was right smartly decomposed."

The court below charged the jury, in part, as follows: "The law does not presume premeditation or deliberation, that must be proven by the State beyond a reasonable doubt; but where there is an intentional use of a deadly weapon that caused the death, the law presumes such killing to be murder in the second degree. Now if a rag stuffed in the throat can, by the manner of its use, cause death, it would become a deadly weapon; and so if the jury should find beyond a reasonable doubt that Early Ashburn stuffed a rag into the infant's throat and did cause death in that way, then the law would presume malice from the use of a rag in that manner, and would presume such killing to be murder in the

second degree. The burden would still be upon the State to prove premeditation and deliberation before it could convict of murder in the first degree, and the malice mentioned need not be express malice in the sense of hatred, ill-will or spite, but may mean an act from a wicked and diabolical heart, bent on mischief; that is what is meant by implied malice. And the State contends further that if you do not find him guilty of murder in the first degree, you should find him guilty of murder in the second degree, and that he, Early, stuffed the rag into the baby's throat and caused its death.

"Now the law says further, if a person forms a design to kill another but does not act simultaneously with the forming of the intent to kill, does the act so quickly after the forming of the intent to kill that there is no time for premeditation and deliberation over it, it is murder in the second degree, and so the State argues and contends that if you dismiss the charge of murder in the first degree that you should find him guilty of murder in the second degree, and argues and contends he had not deliberated upon it, and if there was no appreciable length of time between the forming of the design to kill and killing it, you should find that he, upon a sudden impulse when the baby was born, desiring to conceal the fact of its birth, destroyed its life, formed the intent suddenly and got a piece of rag or cloth and stuffed it into the baby's throat so quickly as that he caused the death simultaneously with the forming of the intent. That he did it in that manner, and that you should at least find if there was no deliberation or premeditation that there was an intentional killing."

There was no evidence of manslaughter. In *S. v. Lane, supra,* 339, it is said: "In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree), unless he can satisfy the jury of the truth of the facts which justify or excuse his act, or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this Court in indictments for homicide." *S. v. Levy, ante,* 589.

We do not think the cases cited by defendant in the brief and supplemental brief applicable to the facts. There is no element of manslaughter that arises out of the evidence in this case. *S. v. Smith, ante,* 471.

Assignments of error Nos. 26, 27, 28 and 29 cannot be sustained as they relate to contentions, for the reasons given *supra* under assignment No. 24.

Under assignment 31 the defendant, in the brief, says: "His Honor told the jury that the defendant contends that Essie Handy was at least an accomplice of his and plead guilty of being an accomplice. Of course the defendant made no such contention, and to state this to the jury coming from the presiding judge was very prejudicial to the defendant."

The complete charge of the court on this aspect of the case is as follows: "Certain prayers of instructions have been asked by the defendant, some of which I have given you and others I will give. The court instructs you that you may convict on the unsupported testimony of an accomplice, but that it is dangerous and unsafe to do so, and the law says it must be after a careful and close scrutiny of the evidence of the accomplice. (*The defendant contends that Essie Handy was at least an accomplice of this man and she had plead guilty of being an accomplice, and that you should not convict on her unsupported evidence.*) That it would be unsafe to do so, and as the court instructs you, after careful scrutiny of it you find she was an accomplice, then her evidence should be carefully scrutinized. That in order to constitute corroborating evidence, the jury must be satisfied beyond a reasonable doubt that the facts relied upon as corroborating evidence existed or have been proven beyond a reasonable doubt, and unless the jury so find they cannot consider the evidence as corroborating, and therefore would reject the same. That is with reference to the evidence as admitted as corroborative evidence. In other words, evidence is not corroborative unless it does actually corroborate. It is a rule of law that while the evidence of an accomplice in the trial of a criminal cause is admissible upon the question of guilt, such evidence should be received by the jury with great caution. In order to convict the defendant the jury must be satisfied from the evidence beyond a reasonable doubt that the defendant Early Ashburn was present and actually killed the child, if it was killed, or aided and abetted in the killing, and unless the jury so find beyond a reasonable doubt they should return a verdict of 'Not guilty.' That the evidence offered by the State tending or which may tend to show illicit cohabitation can only be considered by the jury in furnishing a motive for the commission of the crime charged, and in order to convict the defendant the State must go further and prove beyond a reasonable doubt that the defendant, Early Ashburn, actually killed the child or aided and abetted in accomplishing the death of the child. In this case, as in all criminal actions, the defendant is presumed to be innocent of the crime charged, and this presumption of innocence follows the defendant through every stage of the trial, and it is incumbent upon the State to prove to the jury beyond a reasonable doubt every fact essential to his guilt, and if the State has failed in any such particular, it is the duty of the jury to return a verdict of 'Not guilty.'"

This assignment cannot be sustained as it relates to contentions, for the reasons given *supra* under assignment No. 24. If the defendant made no such contention he should have called the court's attention to it, so that the correction could be made at the time. The charge is fair and impartial.

The court below in the charge, as stated before, gave substantially the prayers for instructions. The court charged the jury: "They offer evidence as to character. Offer evidence of witnesses who say he was a man of good reputation, general reputation was good, what is termed general reputation; and that he had shown this by various persons who lived in and around the city of Mt. Airy who knew him and knew what reputation he had borne generally; and he contends that various witnesses went upon the stand and stated that his character was good, and that there has been no evil reputation or report about him up until this time. The jury may consider that in two lights as to him, first passing on the credibility of his evidence, whether or not he would swear falsely; when you come to weigh his evidence you may consider it in passing on his credibility as a witness. Also as substantive evidence, bearing on whether or not he would commit such crime. The law presumes that a man of good character would not be as apt to commit a crime as a man of bad character, and that is a matter for you to pass upon and say what weight you will give to the evidence of character, both as to the credibility of the testimony and also the substantive evidence as tending to show whether he would commit such a crime, and he contends that he has offered evidence by many witnesses who say they know him and that his character was good and had been for many years, and that this evidence as to character should be sufficient to raise a reasonable doubt in your minds as to whether he would commit an offense of this kind and whether he did commit an offense of this sort. Wherefore, he contends, it is argued to you that you should not find him guilty of any degree of offense here for that he has shown a complete alibi, showing he was elsewhere than at the place Essie Handy says he was at the time her child was born, and knew nothing about it. And furthermore, he has shown a motive on her part and a reason why she herself would destroy the child and that you should find that she herself destroyed it, and that the evidence tended to show that she did. In addition to that, she has pleaded guilty of manslaughter here in court, and that you should find that he not only did not commit this act alone, but that he did not aid or assist her in committing it."

While we can see no error in the trial, yet the conviction of defendant was almost entirely on the unsupported testimony of Essie Handy—from the entire record shown to be an accomplice. Her testimony shows the child was born on the evening of 11 May (Friday). She worked

until a quarter to six that day and went home and shortly afterwards, about dark, called the defendant Ashburn, who worked in a store of C. C. Welch, near by. She was shortly after delivered of the child, when the defendant Ashburn was present, and she became, according to her testimony, immediately unconscious and remained so until the next morning. At the time the child was born, her husband was living separate from her in Jonesboro, and had been away about two years, but came back after the happening. Her husband and mother were put in jail, and she said on cross-examination: "They are innocent. I let them stay in jail at Mt. Airy from 28 June to 2 July before I ever said a word about Early Ashburn. I hated to tell it on him. I was denying that I had a baby." Early Ashburn denied his guilt, proved a good character, and had many witnesses to testify to an alibi. The defendant admitted he was a married man and had illicit intercourse with Essie Handy, a married woman, who was living at the time separate and apart from her husband. On cross-examination Ashburn said: "Yes, I forgot every tie I owed my wife and every tie I owed to God that made me. Of course I knew it was not right. I had quit then. She quit coming and I stopped."

In *S. v. Miller,* 97 N. C., 487, *Davis, J.,* said: "It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal, Roscoe's Criminal Evidence, 121; and this has been well settled as the law of this State, certainly since the cases of *S. v. Haney,* 19 N. C., 390; *S. v. Hardin, ibid.,* 407; *S. v. Holland,* 83 N. C., 624. It is, however, almost the universal practice of the judges to instruct juries that they should be cautious in convicting upon the uncorroborated testimony of an accomplice, and *Gaston, J.,* in *S. v. Haney,* says: 'The judge may caution them against reposing hasty confidence in the testimony of an accomplice. . . . Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach a rule of law.' If the unsupported testimony of the accomplice produce undoubting belief of the prisoner's guilt, the jury should convict." *S. v. Register,* 133 N. C., 746; *S. v. Shaft,* 166 N. C., 407.

The court below charged the law fully and cautioned the jury, "You may convict on the unsupported testimony of an accomplice, but *'that it is dangerous and unsafe to do so.'* " The charge was all, and perhaps more, than the defendant was entitled to.

It was a question of fact for the jury. Early Ashburn has been found guilty and Essie Handy entered a plea of guilty. As told in "The Heart of Midlothian" (by Sir Walter Scott), when Jeanie Dean plead for her sister Effie, convicted of infanticide, before Queen Caroline,

she said: "Alas! it is not when we sleep soft and wake merrily ourselves that we think of other people's sufferings. Our hearts are waxed light within us then, and we are for righting our ain wrangs and fighting our ain battles. But when the hour of trouble comes to the mind or to the body—and seldom may it visit your Leddyship—and when the hour of death comes, that comes to high and low—lang and late may it be yours!—O, my Leddy, then it isna what we hae dune for oursells, but what we hae dune for others, that we think on maist pleasantly."

We here can only pass "upon any matter of law or legal inference." Upon the record we can find no prejudicial or reversible error in law. No error.

CLARK, C. J. I concur in all respects with the very able opinion in this case of *Mr. Justice Clarkson,* and most especially I wish to enter my concurrence with what is said therein treating assignment of error 24, and again the reference to said assignment 24 in the discussion of assignment 31, for the reason that the opinion of the Court in this case in these respects ratifies and confirms what was said in the dissenting opinion in *S. v. Love, ante,* 37-39, which, citing a long list of unbroken decisions, holds as the present case does, that "If the court recites the evidence of the contentions of the parties incorrectly, any objection must be made at the time so as to give the judge opportunity to correct it, and otherwise the objection is waived," here giving a long list of unbroken authorities to that effect, and adding: "There are many others to the same effect and not one to the contrary."

In that dissenting opinion it is further said, at page 39, which is confirmed by the Court in the present opinion: "These are all uniform and unequivocal, and there is no reason why a special exemption from so absolutely settled a rule should be made in favor of this defendant. . . . The presumption of law is in favor of the correctness of the ruling, and the impartiality of the presiding judge and of the jury" (page 39).

In *S. v. Barnhill,* 186 N. C., 450, *Clarkson, J.,* speaking for a unanimous Court, said: "If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal. The rule is stated in *S. v. Baldwin,* 184 N. C., 791, as follows: 'We have so often said that the statement of contentions must, if deemed objectionable, be excepted to promptly, or in due and proper time, so that, if errone-

ously stated, they may be corrected by the court. If this is not done, any objection in that respect will be considered as waived. We refer to a few of the most recent decisions upon this question: *S. v. Kincaid,* 183 N. C., 709; *S. v. Montgomery,* 183 N. C., 747; *S. v. Winder,* 183 N. C., 777; *S. v. Sheffield,* 183 N. C., 783.' See *S. v. Williams,* 185 N. C., 666."

ANNIE McI. CLEGG v. I. N. CLEGG.

(Filed 14 May, 1924.)

1. **Habeas Corpus — Parent and Child — Judgments — Reopening Case— Motions—Procedure.**

Where, in *habeas corpus* proceedings between husband and wife for the custody of their minor children, an order or judgment has been rendered which reserves the cause for further orders as changed conditions may require, either party may thereupon petition to have the matter reopened and proceeded with upon notice to the order and upon motion, in accordance with the course and practice of the courts.

2. **Same — Appeal and Error — Evidence — Findings — Modification of Judgment.**

On appeal from an order or judgment in *habeas corpus* proceedings between husband and wife for the custody of the infant children of the marriage, the facts as found by the judge of the Superior Court are conclusive on appeal when supported by sufficient evidence; and where a material finding does not appear to have been supported by such evidence, the Supreme Court may accordingly change or modify the order of the Superior Court judge, as the welfare of the children may require, under the circumstances presently appearing, and award the custody of the children to each of the parents alternately, requiring the giving of a bond for the observance of the conditions of the judgment or order thus changed or modified.

THIS was a motion to reopen the cause, heard by *Sinclair, J.* From ROBESON. Appeal by defendant.

This cause came on again for hearing upon the motion filed by the plaintiff on 27 November, 1923, praying the court to reopen this cause and to award to her the permanent custody of the three children—Ann Monroe Clegg, Margaret Clegg, and Archie Clegg—upon the grounds that conditions have materially changed since the entry of the former judgment herein. Plaintiff filed affidavit in support of said motion, and thereupon his Honor, N. A. Sinclair, judge riding the courts of the Ninth Judicial District, signed an order requiring the defendant to appear and show cause before him on 10 December, 1923, at the courthouse in Lumberton, and service of the motion, affidavit and order to show cause was duly served upon the defendant on 28 November, 1923.

Thereafter the defendant filed answer as appears of record. Thereafter the defendant filed motion praying for removal of this cause to some other judge for hearing upon the ground that his Honor, Judge Sinclair, had formed and expressed an opinion upon the facts. This motion was denied, his Honor finding facts as appears from the record. Thereafter, upon motion of counsel for the defendant and for their convenience, the hearing was continued until 19 January, 1924, at which time the hearing was not concluded, and the cause was again continued until 23 February, 1924, at which time the hearing was concluded. His Honor thereupon found the facts and rendered judgment, to which findings and judgment the defendant excepted and appealed to the Supreme Court.

W. E. Lynch and Varser, McLean & Stacy for petitioner.
McIntyre, Lawrence & Proctor and H. F. Seawell for respondent.

CLARKSON, J. In *Clegg v. Clegg,* 186 N. C., 40, when this case was before this Court, we said: "That this cause will be retained on the docket of the Superior Court of Robeson County, as this judgment is not intended to be a final determination of the rights of the parties touching the care and control of the children, and on change of conditions properly established the question may be further heard and determined."

The court below reopened the cause and found the facts and rendered judgment. The facts found and judgment, or order, rendered is as follows:

"This cause came on to be heard before the undersigned judge upon petition filed by plaintiff to reopen this cause and modify the judgment heretofore entered, and to award to her the permanent custody of the three children involved in this controversy, upon the ground of alleged changed conditions of the parties since the entry of the former judgment. Service of the petition and order to show cause was duly made upon the defendant, and he filed answer as appears of record.

"The cause was originally set down for hearing before the undersigned at chambers at Lumberton, N. C., in December, 1923, but upon application of the attorneys for the defendant, and for the convenience of the parties and their counsel, the hearing was continued from time to time until 19 January, 1924, at which time the hearing was begun, but not having been concluded upon that date, was again continued by consent until 23 February, 1924, at which time the parties, with their counsel, appeared before the undersigned judge at chambers at Lumberton, N. C., when the taking of testimony was completed and argument of counsel was heard.

"Upon consideration of the evidence, excluding from consideration all matters of hearsay contained in the affidavits and oral testimony, the court finds as follows:

"1. That the changes that have occurred since the entry of the former judgment herein are sufficient to require a modification of the former order.

"2. That the petitioner and the respondent are man and wife living in a state of separation, the petitioner living with her mother at Richmond, Va., and the respondent living at Fayetteville, N. C. The court further finds as a fact from the evidence adduced at this hearing that the conduct of the respondent towards the petitioner was such as to justify her in separating herself from him and in refusing to live with him further, and that such separation should not be taken against her as an abandonment. The court further finds as a fact that the treatment of the petitioner by the respondent was such as to render her condition intolerable and her life burdensome, and that by reason thereof she is forced to live separate and apart from respondent.

"3. That there have grown up such animosities between petitioner and respondent since the institution of this action, and such charges and counter-charges have been made by each against the other, that it is hopeless to expect a reconciliation such as would permit the two to further live together in harmony; and the court finds as a fact that it will be more conducive to the welfare and happiness of both the petitioner and the respondent for them to live separate and apart than to undertake to live together as man and wife, there being no hope of adjusting the differences between them.

"4. That shortly after the separation of the petitioner and respondent the families of each undertook to bring about an agreement between them with reference to the custody of their children, and that such an agreement was entered into between the families of the respective parties, and agreed to and acquiesced in by both petitioner and respondent, whereby it was agreed that the petitioner should have the care and custody of the three children, Ann Monroe, Margaret and Archie, and that the respondent should have the care and custody of the oldest boy, Newton; that, in pursuance of this agreement, the petitioner returned to North Carolina with the respondent to get the youngest child, Archie (she already having with her at that time the two girls, Ann Monroe and Margaret), but was prevented by her husband from taking the youngest child, Archie, back to Richmond with her.

"5. That respondent, since the former judgment in this cause, has given up his home in Rowland and the churches he served at that time and has since maintained no home, but has removed to the city of Fayetteville, where he has accepted missionary work with the First

Presbyterian Church of Fayetteville at a salary of $125 per month, and has abandoned the care and custody of his children to his sister, Marie Clegg, an elderly, unmarried lady who lives in Carthage, N. C., so that he no longer has the home-life which existed at the time of the former hearing when he had his own house and personal supervision over the children; that he only sees them at rare intervals, and the care and custody is no longer under his control, but is under the control of a third person, to wit, Marie Clegg, who lives in her father's home at Carthage, N. C.; that the father of the said I. N. Clegg is a man very old and decrepit, and is himself unable to have any supervision over these children; that, because of the fact that the respondent is now living at Fayetteville while his children are living at Carthage, the control, care and custody of the children having passed out of his hands, the conditions existing at the time of the former hearing no longer exist.

"6. That the respondent on 15 October, 1923, placed his children with his sister, Marie Clegg, at Carthage, N. C., who has the constant care of her father, who is very old and practically helpless, demanding the constant care and attention of the said Marie Clegg; and that the children of the petitioner now receive no attention whatever, except such as the said Marie Clegg is able to give them, and the court finds as a fact that the said Marie Clegg is not temperamentally suited or fitted to have the care and custody of small children; that she is an unmarried woman and unacquainted with the needs of small children, and lacking in sympathy, patience and experience necessary to give said children the care and attention that they should have.

"The court further finds as a fact that the surroundings of the home where the said children are kept is not conducive to their best interests or welfare; that the conditions in said home are detrimental to the interests of said children; that Luther Clegg, uncle of said children, lives in said home, and that he is addicted to drink and frequently intoxicated in the home, and by the use of whiskey creates an unwholesome atmosphere and distasteful example for said young children. Under all of the circumstances, and with the surroundings as they now exist, the court finds that the home where the said children are now kept is not a suitable place for them, and that the welfare and best interests of the three children, Ann Monroe, Margaret and Archie, require that they be allowed to live with their mother at the ancestral home of their maternal grandmother, at Richmond, Va.

"7. That, in accordance with the judgments heretofore entered in this cause, both by this court and the Supreme Court, the petitioner went to Carthage on 17 November, 1923, to see and minister unto her children; that she was at first denied admission to the home where her children were staying, and after being later admitted, she was forced

to see her children in a cold room without any fire, and while there she was abused, insulted, humiliated and physically assaulted by the aunt of said children, Marie Clegg, and on several occasions she was sent away from said home; that she was denied the privilege of seeing her eldest son, Newton Clegg, at all. The court further finds that the respondent failed to properly treat his wife on the occasion of her visit to her said children; that he forcibly and on a public street in the town of Carthage, to the humiliation of petitioner, took one of the said children away from the petitioner; that when petitioner was abused and assaulted by Marie Clegg, the respondent was in an adjoining room, with the connecting door partially open, and did not interfere to make his sister desist, or attempt to protect his wife from insult and assault; and the court further finds that the humiliation attendant upon petitioner visiting her said children at Carthage is more than she should be required to bear, and with the circumstances and surroundings as they now exist, the order heretofore entered in this cause, giving the petitioner the right to visit her said children, is rendered impossible of performance.

"8. That the petitioner, Annie McI. Clegg, is a resident of Richmond, Va., and lives with her mother, a woman of considerable property and abundantly able and willing to give of her means to the support and care of said children, and that the said Annie McI. Clegg is in all respects capable and a fit and suitable person to have the custody of said children, and to properly and carefully provide for them in her home at Richmond, Va., where she lives with her mother. Her mother is a woman about 70 years of age, worth about $40,000, and has a large commodious home, and is a woman of high Christian character. The brothers of the petitioner are men of high standing and character, and the home in which petitioner now lives is found to be in every way a suitable and desirable place in which the children may live and grow up with their mother. The court finds that the welfare and the best interests of the children demand that they be awarded to their mother, Annie McI. Clegg, and that their welfare will be promoted by so awarding them to the custody of their mother, on account of the changed conditions in the home life of the respondent, and the changed circumstances in which the children are placed since the respondent abandoned them to the custody of another.

"9. That, under the changed circumstances and conditions as they now exist, respondent is incapable of giving to said children the support and care to which they are entitled, considering their station in life.

"10. That the failure of the respondent to protect his wife from the abuse, humiliation, insult and assault in the home of Marie Clegg, and the circumstances surrounding it, was such as would prevent the peti-

tioner from living with her husband at any place or at any time, and that her failure to return and live with him in the future cannot be held against her as abandonment.

"11. That Marie Clegg is hostile to the petitioner, and her influence over the children will be unwholesome and will result in prejudice being instilled in their young minds against their mother.

"12. That it would be inimical to the best interest of the children to be deprived of a mother's tender love and sympathy, two of them being young girls just at the age that demands a mother's care, and the other a little boy of such tender years that he needs his mother's constant love and affection.

"Upon the foregoing findings it is considered, adjudged and decreed that the application of the petitioner for modification of the former judgment be and the same is hereby allowed, and that the care and custody of the children, Ann Monroe, Margaret and Archie Clegg, is hereby awarded to the petitioner, Annie McIntosh Clegg."

In *Clegg v. Clegg, supra,* it was said: "This Court is bound by the findings of fact made by the court below, if such findings are supported by any competent evidence. This is now the well-settled law of this State."

From a careful review of the evidence, adduced in the court below, we are of the opinion that there was competent evidence to support all the findings of fact of the court below, with the exception of the fifth finding. We think that the evidence is not sufficient to show that defendant "has abandoned the care and custody of his children to his sister, Marie Clegg," etc. This evidence shows that this was a temporary arrangement.

The order, or judgment, of the court below is modified as follows: This Court is of opinion that the custody of said children, Ann Monroe, Margaret and Archie Clegg, should be awarded to the petitioner, Annie McIntosh Clegg, their mother, as herein provided, but that the welfare of said children would be subserved by spending a part of their time each year hereafter with the respondent, their father, I. N. Clegg, and to this end it is ordered, adjudged and decreed that the custody of said children is awarded the petitioner, their mother, Annie McIntosh Clegg, a portion of each year, as herein set out, and that the custody of the said children be awarded to the respondent, their father, a part of each year, as herein set out. Their father shall have the care, custody and control of said children during the months of June, July, and August of each year, except the year 1924; and the petitioner, their mother, shall have the care, custody and control of said children during the time they are not awarded to their father. The petitioner, their mother, Annie McIntosh Clegg, shall at all times during the time when the

respondent, their father, has the custody of the said children, from 1 June to 1 September of each year, have ingress and egress to the home of the respondent, her husband, to see said children, look after, nurse and care for them in such manner and way as will best promote the welfare of the children, but in no way impairing the authority of the respondent, the father, in the home. Either the petitioner or the respondent shall have the right to visit the children at any time, whether in the custody of the petitioner or respondent.

Both the petitioner and respondent, before taking the children herein named, shall give bond in the sum of $5,000 for the faithful performance of this order or judgment, and the said children shall be amenable at all times to the lawful orders of the courts of this State. The said bonds shall be made payable to the State of North Carolina and filed with the clerk of the Superior Court of Robeson County and approved by him before the children are turned over to either petitioner or respondent. The respondent shall pay the transportation each way for the children when he has the care and custody of them during the summer months; that the respondent deliver said children to the petitioner when she files the bond and it is approved by the clerk as herein set forth; that this cause will be retained on the docket of the Superior Court of Robeson County, as this judgment is not intended to be a final determination of the rights of the parties touching the care and control of the children, and, for good cause shown, the question of the custody of said children may be further heard and determined. The appeal of the respondent from the Superior Court is modified in accordance with this opinion.

The cost of the appeal and the hearing will be taxed against the respondent; that of the lower court to be made out and judgment entered therefor by the clerk of the Superior Court of Robeson County.

Modified and affirmed.

TOWN OF MORGANTON v. HUTTON & BOURBONNAIS COMPANY AND HERMAN BONNINGHAUSEN.

(Filed 14 May, 1924.)

1. Removal of Causes—Diversity of Citizenship—Federal Courts.

Under the Federal Removal Act, in order for a nonresident defendant, joined with a resident defendant, to have the cause removed to the Federal Court for diversity of citizenship, it is required for it to appear from the allegations of the complaint of a resident plaintiff that the defendant movant is a nonresident and that the cause is entirely severable as to him, or that he was fraudulently joined with the resident defendant to

oust the Federal Court of its jurisdiction, or he must show that he was not a mere nominal party and that the resident defendant had no substantial interest in the subject-matter of the controversy.

2. Same—Courts—Jurisdiction.

The filing before the clerk of the State court of a petition and bond by defendant for removal of a cause from the State to the Federal court for diversity of citizenship is not alone sufficient to oust the jurisdiction of the State court, and the latter court may proceed to determine as a matter of law the question of the defendants' right to the Federal jurisdiction, and he may then have an adverse final judgment reviewed in the Supreme Court of the United States, under the provisions of the Federal statute.

3. Same—Complaint—Eminent Domain—Condemnation of Land.

The beneficial interest in lands sought to be condemned for a public use held by a resident defendant, with power to direct the nonresident holder of the naked legal title to convey to whom he may direct, is not sufficient to confer upon the resident defendant the right to remove the cause to the Federal court.

4. Same—Pleadings—Amendments—Statutes.

Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the Federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under C. S., 1414, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act.

5. Same—Cause of Action.

Proceedings for the condemnation of lands for a public use are within the sole jurisdiction of the State court, and present no cause of action within the contemplation of the Federal Removal Act until a controversy has arisen thereupon with a nonresident defendant upon the question of his compensation for the lands thus taken, but never where the interest of a resident codefendant is involved.

APPEAL by Herman Bonninghausen from *Webb, J.*, at January Term, 1924, of BURKE.

This was a condemnation proceeding by the town of Morganton against Hutton & Bourbonnais Company, a domestic corporation, for the condemnation of a large body of timber land for the purpose of providing a watershed and a water supply for the town. The summons was issued 12 August, 1922, and a verified petition was filed 12 August, 1922. The petition was in proper form. On 14 June, 1923, upon affidavit of the town manager that he had notice that Herman Bonninghausen, a citizen of Michigan, claimed that he was owner of the lands, an order was granted by the clerk, making said nonresident a party defendant and giving the petitioner leave to file a supplementary petition, and order a summons to issue for said nonresident. The summons

was issued and served by publication. He filed the supplementary amendatory petition. Thereafter, on 21 August, 1923, the said nonresident, Bonninghausen, filed a petition and bond for removal of the cause to the United States District Court, which was allowed by the clerk, but on appeal to the Superior Court the order was reversed, and the nonresident appealed to this Court.

Avery & Ervin, W. A. Self, and L. E. Rudisill for plaintiff.
Ervin & Ervin, W. B. Councill, and Cansler & Cansler for defendant.

CLARK, C. J. In Black's Dillon on Removal of Causes, sec. 84, it is said, with a wealth of citations, that the following is the rule upon motions to remove causes from a State to the Federal court: "When there are several plaintiffs or several defendants in the cause, and a removal is asked on the ground of diverse citizenship, it is necessary that all of the parties on one side of the controversy (except merely nominal or formal parties, or parties improperly joined, whose citizenship may be disregarded) should be citizens of a different State or States from all of the parties on the other side. It is not enough that some of the plaintiffs may be citizens of different States from some of the defendants. This will not make the controversy one 'between citizens of different States,' within the meaning of the statute as interpreted by the courts. If any one of the plaintiffs is a citizen of the same State with any one of the defendants, the case will not be removable. Even if there is serious doubt as to whether all the defendants are citizens of different States from all the plaintiffs, the Federal court should not take jurisdiction. It is not, however, necessary, when the removal is sought on this ground, that all the plaintiffs should be citizens of the State in which the action is brought, provided they are all citizens of States other than that of which the defendant is a citizen."

In *Lawson v. R. R.*, 112 N. C., 400, *Avery, J.*, quotes *Waitt, C. J.*, in *Stone v. S. C.*, 117 U. S., 430, as follows: "A State court is not bound to surrender its jurisdiction of a suit, on petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer."

And in *Pruitt v. Power Co.*, 165 N. C., 420, it is said: "It is well settled that the State court should not surrender its jurisdiction unless the petition shows upon its face a removable cause and unless such petition and accompanying bond are filed in the State court within the time required by the act of Congress. *R. R. v. Daugherty*, 138 U. S., 298. . . . Whether the petition in its tenor, and time of filing, authorizes the removal, is a matter for decision by the State court in the first instance. That court is not paralyzed by the simple presentation of a petition to remove."

Filing of petition in State court does not *ipso facto* deprive it of jurisdiction. *Howard v. R. R.,* 122 N. C., 944. The Federal court acquires no jurisdiction when petition and bond are filed in clerk's office during vacation. *Howard v. R. R., supra; Higson v. Ins. Co.,* 153 N. C., 40; also, *Dick, J.,* in *Fox v. R. R.,* 80 Fed., 945 (1897).

Whether a case is removable is a question of law, to be decided by the State courts. *Patterson v. Lumber Co.,* 175 N. C., 93; *R. R. v. Daugherty,* 138 U. S., 298; *Springs v. R. R.,* 130 N. C., 198; 122 U. S., 513. And this must be made from the entire record. "The State court is at liberty to determine for itself on the face of the record whether a removal has been effected. If it decides against removal, its action will, after final judgment, be reviewable in the Supreme Court of the United States." *Stone v. South Carolina,* 117 U. S., 431.

There must be a separable controversy, in which the full rights of the nonresident defendant may be determined without the presence of the resident defendant. *Peper v. Fordyce,* 119 U. S., 468. In *Fraser v. Jenison,* 106 U. S., 191, it is stated: "To remove a case on the ground that it is a separable controversy, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it was begun." To same effect, *Hyde v. Ruble,* 104 U. S., 407; *Torrence v. Shedd,* 144 U. S., 527.

Or if there is a fraudulent or illegal joinder of defendants; but, as was said in *Fore v. Tanning Co.,* 175 N. C., 584, by *Hoke, J.*: "In *Hollifield v. Telephone Co.,* 172 N. C., 714, it was held: 'Where a nonresident defendant seeks to remove a cause to the Federal court upon the ground of diversity of citizenship, and alleges in his petition that a resident defendant was fraudulently therein joined to prevent removal, before the State court is under any duty or obligation to surrender its jurisdiction, there must be specific allegation of the facts constituting the alleged illegal or fraudulent joinder, and it is not sufficient to charge generally or by indefinite averment that the joinder is or was intended to be in fraud of the nonresident's rights.'" Also, see *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *Hough v. R. R., ibid.,* at p. 700; 150 Fed., 801.

In *R. R. Co. v. Herman,* 187 U. S., 63, it is held: "While an action commenced in a State court against two defendants, one of whom is a resident and the other a nonresident, may be removed to the Circuit Court of the United States by the nonresident defendant if it can be shown that the cause of action is separable and the resident defendant is joined fraudulently for the purpose of preventing the removal of the

cause to the Federal court, such removal cannot be had if it does not appear that the resident defendant is fraudulently joined for such purpose."

The question of the nature of the controversy is governed by the complaint. Whether there is separable controversy is determined by the complaint. *Staton v. R. R.*, 144 N. C., 135; *Hollifield v. Telephone Co.*, 172 N. C., 714; *Patterson v. Lumber Co.*, 175 N. C., 92. And the plaintiff is entitled to have his cause of action considered as stated in complaint. *Hough v. R. R.*, 144 N. C., 700-702; *Smith v. Quarries Co.*, 164 N. C., 338; *Powers v. R. R.*, 169 U. S., 92; 179 U. S., 135; 200 U. S., 206.

In *Powers v. R. R.*, 169 U. S., 92, it is said: "A separate defense cannot create a separate controversy or deprive the plaintiff of the right to prosecute his own suit to a final determination in his own way, for the cause of action is the subject-matter of the controversy and is what the plaintiff alleges." Cited in 194 U. S., 138. Also, in *R. R. v. Ide*, 114 U. S., 52, it is said: "A defendant cannot make an action several which a plaintiff has elected to make joint."

In condemnation of land of nonresident defendant alone, Federal court seems to have jurisdiction after appraisers have made their award, but never where a resident defendant is interested in the land.

Compensation (*i. e.*, to nonresident), and not taking, places jurisdiction in the Federal court. *McCulloch v. R. R.*, 149 N. C., 313.

State, and not United States, courts have jurisdiction in condemnation proceedings. *Ibid.*, at p. 317, and cases cited therein.

In *Bellaire v. R. R.*, 146 U. S., 117, it is said: "Where the object of the suit is to condemn and appropriate to the public use a single lot of land, the controversy is not divisible because the two defendants own distinct interests and may be entitled to separate damages; and, therefore, one of them cannot remove the cause as to himself alone from the State court to the Circuit Court of the United States."

This case presents these facts of record: In August, 1922, the town of Morganton instituted condemnation proceedings against Hutton & Bourbonnais Company, who duly answered. About nine months passed. On 28 May, 1923, a nonresident, Herman Bonninghausen, subscribed, under oath, a complaint at law—which was later filed in the Federal Court of Western North Carolina—against the petitioner in condemnation proceedings, town of Morganton. Thereafter, the defendant in the condemnation proceedings, Hutton & Bourbonnais, filed an amended answer, and thereupon summons and complaint were served upon town of Morganton in the suit at law instituted in the Federal court. Thereupon, the town of Morganton, under C. S., 1716 and 1728, caused the nonresident, Herman Bonninghausen, to be brought in as party defend-

ant in its condemnation proceeding in the State court, having been put on notice by his suit at law that he claimed an interest in the land in controversy. Whereupon, the nonresident, having forced himself upon the notice of the town of Morganton by his suit at law, and having made it mandatory upon the town of Morganton to make him party defendant in its proceeding, petitioned for an order of removal, which the clerk signed.

The substance of petitioner's argument is: If the town had alleged that the two defendants were *bona fide* owners of distinct interests, of whatever character, in the lands in question, then, from that allegation alone, whether or not it was denied by the one and not answered by the other, the right of removal as to the nonresident would *ipso facto* be defeated. But, since the town alleges, directly or indirectly, that the resident defendant is the real owner and the true party in interest, and that the nonresident is merely a claimant, then such alleged mere claimant, by reason of his being a nonresident, enjoys larger rights than if he were alleged to have a *bona fide* interest in the subject-matter.

The question is whether, in a condemnation proceeding instituted by a municipal corporation, a nonresident defendant—who is an alleged claimant of a tract of land sought to be condemned, and who is joined with an alleged owner who is a resident—may, before joining issues raised on the petition of the town, remove the cause as to himself to the Federal court.

The defendant relies upon the headnote in Railroad Removal Cases, 115 U. S., 1, where it was held that, in a proceeding to widen a street, in which certain land owned by a railroad company was sought to be taken, the controversy between the railroad and the city was separable from that between other property owners and the city and removable alone." But it appears that in that controversy the city was condemning several tracts of land, each tract belonging to separate individuals, in one proceeding for widening a street, upon which the several distinct tracts bordered, and the Court held that, in respect to the tract belonging entirely to the railroad company, a nonresident, the matter in respect to this separate property constituted a distinct controversy between the city and the company, and was therefore removable. An examination of the case, however, shows that the appraisal had been made and the question of the amount of compensation had been arrived at, so that it was properly a *suit,* and "not a special proceeding." In that case *Mr. Justice Bradley,* for the Court, said, citing *Boom Co. v. Patterson,* 98 U. S., 403, that in the *Boom case* "the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned, by the right of eminent domain, and was not 'a suit at law in the ordinary sense of those terms,' and con-

sequently not a suit within the meaning of the Removal Acts; but that when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

"It may be regarded as settled law that the power to take private property for public uses belongs to every independent government exercising sovereign power, for it is a necessary incident to its sovereignty and requires to have no constitutional recognition. *U. S. v. Jones,* 109 U. S., 513. . . . Legislation in the exercise of this inherent power, though subject to judicial control, is said to be practically unlimited if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *R. R. v. Davis,* 19 N. C., 451; *Lecombe v. R. R.,* 23 Wall., 108. The mode of exercising the power of eminent domain, unless otherwise provided in the organic law, rests in the sound discretion of the Legislature, subject, however, to the principle just stated, that there must be sure and adequate provision for compensating the owner." *Jeffress v. Greenville,* 154 N. C., 494, and cases therein cited. To the same effect, *Kohl v. U. S.,* 91 U. S., 451.

"The method for taking the land for public use is within the exclusive control of the Legislature, limited by organic law. The exercise of this power being a political and not a judicial act, the courts cannot help the injured landowner in a case like this, where the statute has been strictly followed *until the question of compensation is reached." Durham v. Rigsbee,* 141 N. C., 132, and cases there cited.

The proceeding in the present case, before commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. The counsel for Bonninghausen in this case state in their brief that he has instituted an action of ejectment in the United States District Court against the town of Morganton, alleging that he is the owner in fee of said lands and that the plaintiff has unlawfully trespassed upon the same, demanding judgment to be declared sole owner and recover damages for the trespass. The plaintiff has moved, under C. S., 1414, to amend, in this Court, by setting up the contract between Bonninghausen and Hutton & Bourbonnais and the deed executed to said Bonninghausen. This the Court has power to permit, and the counsel for said Bonninghausen has also consented that these may be inserted in the record.

An examination of these papers shows a conveyance from Arthur G. Olmstead and wife and others to Herman Bonninghausen, with an express stipulation that said parties of the first part "do not warrant,

by express or implied warranty, or agree to defend against or convey or intend to convey any other or greater title, interest or possession than was invested in them by a deed from the South Mountain Land Company on 22 March, 1901, and the contract, made the same day by said Bonninghausen to Hutton & Bourbonnais, recites that he "holds said lands only in and upon the trust above mentioned, and that upon demand by the parties of the second part (Hutton & Bourbonnais) he will convey the lands to the South Mountain Lumber Company or to such other firm, etc., as the parties may designate." In effect, therefore, it appears that the legal title has been placed in Bonninghausen to convey the property to any person that may be designated hereafter by Hutton & Bourbonnais, a North Carolina corporation.

It would be singular, indeed, if upon these facts the State was deprived of the right to condemn this property for the public use of the town of Morganton.

Whenever the matter of distribution of the compensation arises, then, and not until then, would the matter of jurisdiction be presented as to whom it shall be distributed. At present Hutton & Bourbonnais are the beneficial owners, having power to direct to whom the conveyance by the trustee, Bonninghausen, shall convey the land. Bonninghausen holds only the bare legal title, as trustee, to convey at the instance of Hutton & Bourbonnais, a North Carolina corporation.

The petition to remove the cause to the Federal court was properly denied.

Affirmed.

SOUTHERN STATE BANK v. BETTIE LEVERETTE, PAUL LEVERETTE, MRS. L. A. SUMNER.

(Filed 21 May, 1924.)

1. Tenants in Common—Courts—Jurisdiction—Title—Clerks of Court.

While the title to lands is not involved in proceedings among tenants in common to partition lands unless put in issue, the effect of the clerk's order for division is to vest the title in each tenant in the lands apportioned to him; and after the apportionment of the lands have been made, in proceedings for partition among tenants in common before the clerk, without appeal, a lease by one of the tenants can only affect that portion which has been allotted to him.

2. Same—Writ of Assistance—Equity—Writ of Possession—Petition and Affidavit.

A writ of assistance to put the owner of lands in possession which is wrongfully being withheld from him, contrary to the judgment of the court rendered in the proceedings, is one cognizable only in a court of equity and not within that of the clerk of the court in proceedings to par-

tition lands among tenants in common; but where, after the division of the lands has been finally made, without appeal, he may issue a writ of possession to that effect; and where it may be seen from the substance of his petition and affidavit that the legal remedy is applicable, this writ may be issued, though therein spoken, if as a writ of assistance, the effect being practically the same in both instances.

3. Same—Appeal—Derivative Jurisdiction—Constitutional Law.

The clerk of the Superior Court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, when one of the tenants wrongfully withholds possession from another, nor can jurisdiction be conferred on the Superior Court on appeal, the latter having no concurrent or original jurisdiction, under the provisions of the statute (C. S., 637), valid under the provisions of the Constitution of 1875.

4. Same—Judgments—Estoppel.

In proceedings to partition lands among tenants in common, the adjudication before the clerk of the Superior Court operates as an estoppel as to them and those in privity with them, when no appeal has been taken. C. S., 3231.

APPEAL by L. A. Sumner from *Ray, J.*, at November Term, 1923, of HENDERSON.

T. J. Rickman and Shipman & Justice for plaintiff.
D. L. English and O. K. Bennett for appellant.

ADAMS, J. In 1899, M. L. Sumner, seized of a tract of land, died intestate, leaving surviving him the defendant L. A. Sumner as his widow and the defendant Bettie Leverette and seven other children as his heirs at law. After the intestate's death, the plaintiff acquired the title of all the heirs, except Bettie Leverette, and brought a proceeding before the clerk of the Superior Court for partition, alleging that she and the plaintiff were tenants in common, subject to the widow's right of dower. Only the widow filed an answer. The clerk transferred the case to the civil docket for the trial of issues alleged to have been raised by the pleadings; but upon appeal Judge Bryson reversed the order of the clerk and remanded the cause for further proceedings. In their brief the appellant's counsel practically admit that the judge's order was free from error. When the case was remanded, the clerk decreed the partition of the land and the assignment of dower. The commissioners assigned dower to the widow, and allotted to the plaintiff and to Bettie Leverette their respective portions of the land described in the petition. The report of the commissioners was approved and confirmed. The appellant did not except to the order appointing the commissioners, or to their report, or to the decree of confirmation. The report was confirmed on 17 May, 1923, and in June the plaintiff applied to the

clerk for a writ of assistance, based upon an affidavit. An *alias* notice to the appellants to show cause why the writ should not be granted was duly issued, and on 16 August returned served. The appellant entered a special appearance, and moved to dismiss the motion, and, after noting an exception, filed a written answer to the notice. The clerk held that the writ should issue, and his judgment was affirmed on appeal to Judge Ray. The widow excepted, and appealed to this Court.

The appellant admits that the partition of the land and the allotment of dower were not "resisted strenuously," but she says the writ of assistance is resisted on the ground that the appellant is in possession of all the land described in the petition, under a lease from one of the tenants in common. In her answer to the original petition the appellant alleged that she held a lease, dated 2 August, 1921, from one of the tenants in common for the land described in the petition, and that it would not expire until 2 August, 1926. If the lease was pleaded in bar of partition it seems not to have been relied on, for it was not referred to again until after the plaintiff had applied for the writ of assistance. Without regard to the alleged right one of several tenants in common to execute a lease upon the common property, we are confronted with uncertainty and indefiniteness as the execution of the lease, as to its contents, as to the name of lessor, and as to the question whether it was executed before or after the plaintiff acquired its title. If the lease was executed by Bettie Leverette, as stated in one of the briefs, would its operation not be confined in any event to her interest? And as her interest has been allotted by metes and bounds, in what way could her lease to the appellant be effective against the land allotted to the plaintiff? Besides, on an application for a writ of assistance, the title cannot be adjudicated or the original case reviewed, or the decree modified. *Investment Co. v. Tel. Co.,* 156 N. C., 259; *Exum v. Baker,* 115 N. C., 242; *Roberts v. Dale,* 171 N. C., 466; 27 Cyc., 1142 (3); 310 Cyc., 211; 7 R. C. L., 885 (80); 5 C. J., 1322 (13) and 1325 (22).

But the appellant presents a more serious question. She contends that a writ of assistance may be issued only by a court of chancery, and that the clerk who signed the decree had no equitable jurisdiction.

This writ is of remote origin, dating as far back as the reign of Henry VIII. It has been defined as a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which it has previously adjudicated, as a means of enforcing its decree. See authorities cited in Ann. Cas., 1913 D, 1120, note. In Beach's Modern Equity Practice, Vol. 2, sec. 897, it is said: "Courts of equity have from the earliest times exercised the right to issue a writ of assistance in actions in equity brought for the purpose of determining the rights of the litigants to the title or possession of real estate

after judgment declaring such rights, as well as in cases for the foreclosure or redemption of mortgages. In such cases the courts having jurisdiction of the persons and property in controversy have, after determining the rights of the parties litigant to the title or possession of real estate, rightfully assumed the power to enforce their judgments by the writ of assistance to transfer the possession instead of turning the party over to a court of law to recover such possession."

Mr. Justice Ashe remarked that the writ may be termed an equitable *habere facias possessionem,* for it is issued only from courts of chancery (*Knight v. Houghtalling,* 94 N. C., 408); and all the subsequent decisions have treated the writ as issuable only from a court of equity. *Coor v. Smith,* 107 N. C., 430; *Exum v. Baker,* 15 N. C., 242; *Wagon Co. v. Byrd,* 119 N. C., 460; *Clarke v. Aldridge,* 162 N. C., 326; *Lee v. Thornton,* 176 N. C., 208.

As the writ can issue only from a court of chancery, the next question is whether the clerk in the proceeding before him had equity jurisdiction.

At common law, coparceners were entitled to partition; upon tenants in common the right was conferred by statute. 2 Bl., 189, 194; *Holmes v. Holmes,* 55 N. C., 334. But the English courts of chancery also entertained suits for partition, and in this country the several State courts possessing general equity powers are regarded as having jurisdiction, unless their authority has been abrogated or restricted by statute. 30 Cyc., 170. Prior to 1868, both our courts of equity and our courts of law entertained such suits. *Chief Justice Ruffin* said: "The right of a tenant in common to partition of a legal estate is as absolute in this Court as it is at law; for the jurisdiction as to actual partition is concurrent in the courts of law and equity, and therefore both courts must adjudicate on the same principle. The only necessity a tenant in common is under for coming into the court of equity is that which arises from the inconvenience of an actual partition and induces him to apply for a sale." *Donnell v. Mateer,* 42 N. C., 94. See, also, *Weeks v. Weeks,* 40 N. C., 111, 119. But, since 1868, partition has been regulated by statute. *Haddock v. Stocks,* 167 N. C., 70; C. S., 3213, *et seq.* The proceeding is now brought before the clerk, but the clerk has not been given the powers of a court of chancery. "He has no equity jurisdiction, and, besides, the statute giving jurisdiction to courts of equity over sales for partition has been repealed by sections 1903 and 1904 of The Code (C. S., 3233, 3241), which confers that jurisdiction upon the Superior Courts, to be exercised by the clerk, who is not vested with any equity powers, except where specially conferred by statute." *Ashe, J.,* in *Bragg v. Lyon,* 93 N. C., 151, which is approved in *Vance v. Vance,* 118 N. C., 865, and in *McCauley v. McCauley,* 122 N. C., 289.

From this position the Court has never receded. In a few decisions may be found isolated *dicta* suggesting that the clerk and justices of the peace may affirmatively exercise the functions of a court of equity, but the suggestion runs counter to several decisions and is not in accord with the doctrine long since declared by the Court and thence consistently maintained. The provision of the Constitution of 1868 prescribing the jurisdiction of a clerk of the Superior Court was purposely omitted by the Convention of 1875, and the clerk's duties now are chiefly such as are imposed by statute. *Brittain v. Mull,* 91 N. C., 499.

The appellant contends, however, that by virtue of C. S., 637, the order of the judge should be sustained, even if the clerk had no jurisdiction to issue the writ. The section is as follows: "Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction, and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back, to be proceeded in before the clerk, in which case he may do so."

There are at least two reasons why, in our opinion, the appellant's position is unsound. The decisions construing this section show that in every "civil action or special proceeding sent" from the clerk to the judge, there was some element which apparently brought the case within the jurisdiction of the clerk. It is true that in *Anderson's case,* 132 N. C., 244, *Montgomery, J.,* remarked that the judge was clothed with power to determine the controversy, although the proceeding before the clerk was a nullity for the reason therein pointed out; but a careful perusal of the record discloses the fact that the clerk had jurisdiction of the proceeding before him, and the Court simply held that the judge, on appeal, could retain jurisdiction, although the clerk, mistaking his powers, had rendered a judgment which was void. And in *Stone's case,* 176 N. C., 337, the action was still pending in the Superior Court, and the motion before the clerk was treated as a motion in the original cause. *Foreman v. Hough,* 98 N. C., 386; *Ledbetter v. Pinner,* 120 N. C., 456; *Faison v. Williams,* 121 N. C., 152; *Roseman v. Roseman,* 127 N. C., 494; *Coletrain v. Laughlin,* 157 N. C., 282; *Luther v. Luther, ibid.,* 500; *Williams v. Dunn,* 158 N. C., 399; *Baggett v. Jackson,* 160 N. C., 26; *Mills v. McDaniel,* 161 N. C., 113; *Thompson v. Rospigliosi,* 162 N. C., 146; *Ryder v. Oates,* 173 N. C., 569; *In re Brown,* 185 N. C., 399; *Hall v. Artis,* 186 N. C., 105; *In re Ware, ante,* 693.

There is another objection to the appellant's position. It may be contended that the jurisdiction of the judge can be maintained on one of two grounds—(1) because the clerk had jurisdiction and the juris-

diction of the judge was derivative, or (2) because the judge would have had jurisdiction if the application for the writ had been originally lodged, not before the clerk, but in the Superior Court. From what has been said, it is apparent, we think, that the clerk, not exercising equity jurisdiction, had no authority to issue the writ, and the judge had no derivative jurisdiction. It is equally clear that the judge was without original jurisdiction, because a writ of assistance must issue from the court in which the final judgment or decree was rendered, and from the clerk's judgment no appeal was taken. Ann. Cas. 1913 D, 1125, note; *Lunstrom v. Branson,* 52 L. R. A. (U. S.), 697, and note; 5 C. J., 1323 (15).

But upon a careful examination of the record and the authorities, we have concluded that there is another theory upon which the judgment may be modified and upheld. The principal distinction between a writ of assistance and a writ of possession is this: While the office of each is to put a party entitled thereto into the possession of property, the former issues from a court of equity and the latter from a court of law. 2 R. C. L., 726.

The final decree, signed by the clerk in the proceeding for partition, dissolved the unity of possession; and while it did not pass title, it vested in severalty the title to each of the tracts or parcels allotted to the respective tenants, and operated as an estoppel upon the parties to the proceeding and those in privity with them. Not having appealed from the clerk's judgment, the parties assented to it, and cannot now impeach it. Each tenant is entitled to the possession of the share allotted him, and if one tenant withhold such possession, we see no satisfactory reason why the clerk should not issue a writ of possession in behalf of the legal claimant and dispossess the party who, while bound by the decree, wrongfully withholds possession. Although the plaintiff has applied for a writ of assistance, its affidavit meets the requirements of a motion for a *habere facias possessionem,* or writ of possession; and as the original proceeding was at law, we think the plaintiff is entitled to the latter writ. It would be unreasonable to require the plaintiff to bring a separate action at law to eject an intruder who, as a party to the proceeding, is estopped by the judgment. C. S., 3231; *Weeks v. McPhail,* 128 N. C., 129; *S. c.,* 129 N. C., 73; *Buchanan v. Harrington,* 152 N. C., 333; *Weston v. Lumber Co.,* 162 N. C., 165; *Propst v. Caldwell,* 172 N. C., 594.

The judgment is modified to the extent of authorizing the clerk to issue a writ of possession instead of a writ of assistance, commanding the proper officer to dispossess the appellant and put the plaintiff in possession of the land allotted it by the judgment of the clerk.

The appellant's motion to dismiss for want of service is without merit.

Modified and affirmed.

C. D. RAY AND R. M. RAY v. GEORGIA H. POOLE.

(Filed 21 May, 1924.)

Estates — Remainder — Partition Statutes — Contingent Remainders — Clerk's Jurisdiction—Appeal—Superior Courts.

A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of C. S., 3215, and these proceedings so brought cannot be validated by derivative jurisdiction in the Superior Court, on appeal, under the provisions of C. S., 1744, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements, for the protection of contingent remaindermen, which must be strictly followed; and, though under C. S., 3234, 3235, a sale is provided when the land is affected with contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants.

APPEAL by plaintiffs from *Harding, J.*, at April Term, 1924, of GRANVILLE.

The defendant contracted to convey to the plaintiffs a certain lot in Oxford at the purchase price of $2,900. Subsequently the plaintiffs declined to take the deed tendered, alleging that defendant could not convey a good and sufficient title.

On 7 September, 1908, H. C. Herndon conveyed to the defendant, Georgia H. Poole, certain parcels of land in Oxford, among which was included the land in controversy. The deed specified that the conveyance was to "Georgia H. Poole for her lifetime and at her death to her children, in equal shares"; and the *habendum* clause recited: "Her interest to each of these properties is during her lifetime and after her death to her children, in equal shares." At the date of said deed she had two children—one named Bettie and the other John—both minors, without guardian. They were and are the only children of Georgia H. Poole, who is now 54 years of age.

On 28 March, 1911, she conveyed to John R. Young, her brother, a one-half undivided interest in the life estate conveyed to her by Herndon, as aforesaid. On 22 April, 1911, John R. Young instituted before the clerk of the court of Granville a special proceeding against Georgia H. Poole, Bettie Poole, and John H. Poole for partition by sale of the lands described in the aforesaid deed. A guardian *ad litem* for said infants was appointed, who filed an answer, admitting the material allegations in the petition for sale for partition. On 12 May, 1911, an order of sale, in accordance with the petition, was made, a commissioner appointed, and sale made, after due advertisement, at which John R.

Young became the purchaser of said land, for himself and sister, for the sum of $5,400. The sale was duly confirmed by the court, and a deed executed by the commissioner to John R. Young and Georgia H. Poole on 3 July, 1911. On 15 July, 1911, letters of guardianship upon the estates of Bettie and John H. Poole, infants, were granted to John R. Young, their uncle.

On 3 February, 1912, Georgia H. Poole conveyed her one-half interest in the land to her brother, John R. Young, and on 26 March, 1915, he reconveyed to said Georgia H. Poole all his right, title and interest in said property by deed, duly recorded.

In 1922 the said Georgia H. Poole contracted, in writing, to convey to the plaintiffs the lot in question, duly described in said contract, for the sum of $2,900, and later tendered them a deed in fee simple on 23 November, 1923, with full covenants of warranty, which they refused to accept, upon the ground that the defendant was unable to convey a good title to the same.

The controversy was thereupon submitted to the Superior Court upon a case agreed, who adjudged that the defendant, Georgia H. Poole, had a good and sufficient title in fee to said lot, and had a good right to convey the same, and should recover the sum of $2,900 therefor. Appeal by plaintiffs.

Parham & Lassiter for plaintiffs.
A. W. Graham & Son for defendant.

CLARK, C. J. The defendant contends that the remainder to the children of Georgia H. Poole under the deed from H. C. Herndon was a vested remainder, and that a life tenant can maintain a partition proceeding against the remainderman; and, further, if the court should be of the opinion that the remainder to the children was contingent, then the irregularity in bringing the proceeding before the clerk instead of the judge has been cured by chapter 64, Laws 1923, which was a reenactment of C. S., 1745.

We find no authority in this State to support a proceeding for partition between the life tenant and the remainderman. Georgia H. Poole, as life tenant, could not maintain this proceeding against the infant remaindermen, and a different result cannot be attained by merely splitting the life estate between her and her brother. He was in no stronger position in regard to the remaindermen than she was prior to her conveyance to him.

It would seem manifest that the conveyance by her was made for the purpose of bringing the partition proceedings to sell the interest of the children and vesting the title in the life tenant, free of limitations. The statute (C. S., 3215) provides that one or more persons claiming real

estate as joint tenants or tenants in common may have partition, but is no authority for partition as between the life tenant and the remaindermen, except where the proceeding is brought by the remaindermen and the life tenant is joined. Nor does C. S., 1745, authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children.

C. S., 1744, provides: "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or where the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the Superior Court at term-time, which proceeding shall be conducted in the manner pointed out in this section."

In this case there was only an ordinary partition proceeding before the clerk of the court. If this were a contingent remainder, there was neither allegation in the petition nor finding of fact by the court that the sale was advantageous to the remaindermen. There was no order for the reinvestment of the interest of the remaindermen, though this would not probably affect the title to the purchaser. All these things are contemplated by the statute and by the court in dealing with the title of remaindermen when they are not determined and who cannot speak for themselves. Conceding that the two children of Georgia H. Poole, who were parties to the proceeding, represent their class, it may be that there will be no children of Georgia H. Poole living at the time of her death. The clerk of the court was not clothed with jurisdiction to decree and confirm a sale in a case like this.

Where the Legislature has by statute prescribed the method by which all the proper parties to a proceeding shall be protected, that method must be followed. It was not contemplated by this statute that the rights of the parties in such case as this should be entrusted to the clerks of the Superior Court in ordinary special proceedings without approval or confirmation by a judge of the Superior Court. C. S., 1744, prescribes the method in which there shall be a sale decreed where there is a contingent remainder and requires a decree for proper investment of the funds of the remaindermen. *Springs v. Scott,* 132 N. C., 549, and the cases thereto cited in the Anno. Ed.

Though we have considered the irregularities, if there had been a contingent remainder in this proceeding there is an insuperable one, even if these requirements of the statute had been complied with. It will be noted that, under C. S., 3234 and 3235, while there is authority for a sale for partition, at the instance of the remaindermen, of the reversion, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen.

In 20 R. C. L., 744, it is said, with ample citation of authority: "It is believed to be universally established in the United States, under the different state statutes, that a tenant for life or for years may compel partition between himself and his cotenants, whether the other tenants hold their shares for life or in fee, but unless otherwise provided by statute to the contrary, it is the general rule that a tenant for life is not entitled to maintain partition against reversioners, remaindermen or others having a future conditional interest. Where there is an estate for years in real property held in cotenancy by the parties to the action, and a reversion held by one of them only, the partition must be limited to the estate for years, and though partition cannot be made otherwise than by sale, it cannot include the reversionary interest. Even where the owners of the reversion are by statute proper parties defendant to a partition suit between tenants in common of a life estate, it has been held that the plaintiff can have a partition of the life estate only, and not of the fee belonging to the reversioners." These propositions are supported by ample citations, and are based upon the strongest considerations; for in a partition at the instance of a life tenant against tenants in reversion, the latter would ordinarily fare badly. These decisions, also, as just said, are in accord with our own statute (C. S., 3234 and 3235), which authorize merely the joinder in a petition for partition when brought by life tenants against those in remainder, if it is contingent.

In 30 Cyc., 182, it is said: "It was the rule, both at common law and chancery, that none but estates in possession were subject to compulsory partition. This rule prevails in the United States except where it has been abrogated or modified by statute." And it is further said that actions for partition cannot be sustained where the remainder is sought to be partitioned "except in a few States where the rule has been changed by statute allowing partition among remaindermen and reversionaries subject to the preceding estate in possession. This right, although created by statute in Illinois, cannot be exercised if the interest of the parties cannot be ascertained until after the death of the life tenant."

And it is there pointedly added: "A cotenant of an estate in possession less than in fee, although entitled to partition, cannot by his partition affect an estate in reversion or a remainder unless authorized to do so by statute," citing to that effect among other cases *Simpson v. Wallace,* 83 N. C., 477, and *Williams v. Hassell,* 74 N. C., 434, which last has been cited in many cases since. See Anno. Ed. And while the act of 1887, now C. S., 3234 and 3235, has authorized a sale at the instance of the remaindermen, or between the life tenants, there is, as above said, no authority by which the life tenant can "freeze out" the

children or other tenants in reversion or remainder. *Gillespie v. Allison,* 115 N. C., 542, and *In re Inheritance Tax,* 172 N. C., 174.

The judgment, therefore, under which the property was sold at the instance of Georgia H. Poole was not only irregular in the particulars pointed out but was invalid, being without authority of law as against the tenants in reversion or remainder, and the judgment below is

Reversed.

NOTE.—This opinion was written in accordance with the Court's decision and filed, by order of the Court, after *Chief Justice Clark's* death.

JOHNSON BROTHERS v. A. O. LEE AND A. W. LEE.

(Filed 21 May, 1924.)

1. Deeds and Conveyances—Interpretation—Intent.

The court, in interpreting a deed to lands, will give effect to the intent as gathered from the instrument construed as a whole, when not controlled by an arbitrary rule of law, and the *habendum* clause may be considered in ascertaining the true intent of the instrument.

2. Same—Estates—Remainders.

A conveyance of land in the premises to the grantee, his heirs and assigns, subject to limitations thereinafter set forth, with *habendum* to him for and during the period of his natural life, and after his death, to his children then living, and those who may hereafter be born to him (as set forth in a former deed in the chain of title), and covenant to the grantee and his children and their heirs and assigns; and under the former deed it appears that the fee of the grantee in the later deed appeared as set forth in the *habendum* and warranty, but that at the time of the prior conveyance the grantee was a young unmarried man: *Held,* the present deed will be construed to effectuate the intention of the parties as expressed more definitely in the *habendum* and warranty, with a life estate only to the first taker.

3. Same—Title—Fee Simple—Contingent Remainder—Statutes.

Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then *in esse,* the first taker holds the legal title until the birth of children after his marriage, at which time such estate becomes vested, such remainder being contingent until the birth of a child during the existence of the freehold estate, and then vests in such child or children who would then take and hold the interest. C. S., 1738.

CONTROVERSY without action submitted on case agreed, and determined by *Daniels, J.,* at September Term, 1923, of the Superior Court of HARNETT.

From the case agreed it appears that plaintiff, having a judgment duly docketed against defendant A. O. Lee, the son, desires to enforce

same against his interest in a tract of land in said county, plaintiff claiming that same is an undivided interest in remainder after the life estate of his father, the codefendant, the latter claiming to own the land in fee simple.

It further appears that in 1884 J. B. and Charity Lee conveyed a tract of land in said county to A. W. Lee by deed in the same terms as to the estate and quantity of interest as that now contained in a deed from R. L. Godwin to A. W. Lee, A. O. Lee and others, children of A. W. Lee. That this land was sold for reinvestment under a decree of the court, and the proceeds on such reinvestment were used in purchase of the land in controversy and conveyed to A. W. Lee, etc., in terms as follows:

This deed, made this 2 October, 1909, by R. L. Godwin, unmarried, of Harnett County, North Carolina, party of the first part, to A. W. Lee, of said county and State, party of the second part:

Witnesseth: That, whereas, on 27 November, 1884, J. B. Lee and wife, Charity C. Lee, conveyed to the said A. W. Lee a certain tract of land by deed of said date, recorded in Book Q, pages 222, 223, of the records of Harnett County, to be held by him subject to such limitations as are in said deed expressed.

And whereas, at the September Term, 1919, of Harnett Superior Court, a decree was entered in a civil action entitled *A. W. Lee and Wife, L. J. Lee, v. A. O. Lee et al.,* being the children of the plaintiffs, decreeing a sale of the above-mentioned lands, and appointing N. A. Townsend and J. C. Clifford commissioners of the court, with authority to make said sale and to reinvest the funds arising from said sale in other real estate, to be held by the said A. W. Lee subject to the same limitations set forth in the above-mentioned deed.

Now, therefore, in consideration of the sum of $2,730, to the party of the first part paid by N. A. Townsend and J. C. Clifford, commissioners as aforesaid, receipt of which is hereby acknowledged, the party of the first part does hereby bargain, sell and convey to A. W. Lee, *his heirs and assigns,* subject to the limitations hereinafter set forth, a certrain tract of land in Harnett County, North Carolina, in Averasboro Township, described as follows: (Description omitted.)

To have and to hold the above-described lands, to the said A. W. Lee, for and during the period of his natural life, and after his death to the children of A. W. Lee, both those now living and those that may hereafter be born to him, in fee simple, as set forth in the deed of J. B. Lee and wife, Charity C. Lee, to A. W. Lee, hereinbefore mentioned and as set forth in the decree of Harnett Superior Court hereinbefore referred to.

And the said R. L. Godwin covenants with the said A. W. Lee and his children, and their *heirs and assigns,* that he is the owner in fee of said lands, and has the right to convey the same in fee simple; that the same are free from any encumbrances, and that he will forever warrant and defend the title to the same against the lawful claims of all persons whomsoever.

In witness whereof, the said R. L. Godwin has hereunto set his hand and affixed his seal, the day and year first above written.

R. L. GODWIN. (Seal.)

It further appears that at the time of the conveyance in 1884 from J. B. and Charity Lee, A. W. Lee was a young unmarried man without children, and later married and had children, A. O. Lee and others, who were alive at the time of said deed from R. L. Godwin. Upon these facts the court entered judgment as follows:

"This cause coming on to be heard before the undersigned judge at the September Term, 1923, of the Superior Court of Harnett County, and the same being heard upon the submission of a controversy without action, it is considered, ordered and adjudged by the court that the defendant A. W. Lee is entitled to only a life estate in the lands described in the deed from his father and mother, J. B. Lee and wife, Charity C. Lee, dated 27 November, 1884, which were sold by order of court and the funds reinvested in the lands described in deed from R. L. Godwin to A. W. Lee, dated 2 October, 1909, which lands were to be held by the said A. W. Lee upon the same terms and conditions as set forth in the deed from his said father and mother, and he is therefore entitled to only a life estate in said lands. It is found as a fact that the said A. W. Lee was unmarried and had no children at the time of the execution of the deed from J. B. Lee and wife, Charity C. Lee.

F. A. DANIELS,
Judge Presiding."

From which said judgment defendant A. W. Lee excepted and appealed, assigning for error that the court failed to hold that A. W. Lee owned the land in fee simple.

H. L. Godwin for defendants.

HOKE, J. It is now held for law in this jurisdiction that the premises or granting clause of a deed is not to be considered as always controlling in reference to the estate conveyed, but "if on a perusal of the entire instrument, including the *habendum,* it clearly appears that a lesser

estate was intended than that conferred in the premises, such a construction should prevail, and the intent of the grantor be given effect." In a case before the Court at the present term, *Bagwell v. Hines, ante,* 691, the position was considered, and the view of the Court as it now prevails concerning it was expressed as follows:

"It was formerly held in this jurisdiction, and with some strictness, that the *habendum* of a deed was not allowed to destroy an estate or interest definitely conveyed in the premises or to create an estate that was necessarily repugnant to it. *Wilkins v. Norman,* 139 N. C., 39; *Blackwell v. Blackwell,* 124 N. C., 269; *Rowland v. Rowland,* 93 N. C., 214; *Hafner v. Irwin,* 20 N. C., 570. The position was somewhat modified in the well-considered case of *Triplett v. Williams,* 149 N. C., 394, opinion by *Associate Justice Brown,* wherein it was held that except when otherwise controlled by an arbitrary rule of law, as by the rule in *Shelley's case,* the question was largely one of intent, and if on a perusal of the entire instrument, including the *habendum,* it clearly appeared that a lesser estate was intended than that conferred in the premises, such a construction should prevail and the intent of the grantor be given effect, a case that has been cited with approval in numerous decisions of the Court."

In the *Bagwell case* it was held that the instrument having in express terms conferred an estate in fee simple in the premises, the subsequent clauses in apparent modification of this estate were not sufficiently definite to effect a change of the granting clause, and the estate in fee was upheld. In the present case, however, the granting clause does not definitely convey an estate in fee simple. On the contrary it purports to sell and convey the land to "A. W. Lee, his heirs and assigns, subject to the limitations hereinafter set forth." And these limitations, appearing in the *habendum,* are as follows: "To have and to hold the above-described lands, to the said A. W. Lee for and during the period of his natural life, and after his death to the children of A. W. Lee, both those now living and those that may hereafter be born to him, in fee simple, as set forth in the deed of J. B. Lee and wife, Charity C. Lee"; thus clearly conveying to A. W. Lee an estate for life, remainder to his children in fee.

It is insisted for appellant that as this estate was created and its extent declared by the deed of 1884, at a time when A. W. Lee had no children, he took a fee simple, and we are cited to *Cole v. Thornton,* 180 N. C., 90; *Silliman v. Whitaker,* 119 N. C., 92; *Hunt v. Satterwhite,* 85 N. C., 73; *Dupree v. Dupree,* 45 N. C., 164, and other decisions, in support of the position. But in those and other like cases the estate was presently conveyed or attempted to be conveyed directly

to the children, and under the established principle that in common-law deeds there must always be a grantee presently capable of taking the estate, only children living at the time the deed was made could take (extended by statute, C. S., 1738, to unborn children *in esse*), it was therefore held that where a grant or deed is to A. and his or her children, and there were no children alive at the time, the grantee would take the entire estate, a fee tail, at common law, converted by our statute into a fee simple. C. S., 1734. The cases cited, however, and the principle they approve and illustrate do not apply to an estate conveyed in remainder after a freehold estate first given, and in such deed children, prospective grantees, born during the existence of the freehold estate would take and hold their interest. Such estate being by way of contingent remainder until birth of a child. Thus, in Shepherd's Touchstone, pp. 229-234-235, after treating of the necessity of a grantor, grantee and a thing granted in order to a valid grant, the author, as to the grantee, among other things, says: "There shall be a person in being at the time of grant made (if he be to take immediately, etc.), but if he be to take by way of remainder it is not necessary that he should be in being so as there be a preceding estate of freehold to support a contingent remainder," etc. This statement of the learned author is fully recognized in this State in *Dupree v. Dupree,* 45 N. C., 164, in *Newsome v. Thompson,* 24 N. C., 277, and other cases, and is directly approved and applied with us in *Powell v. Powell,* 168 N. C., 561.

In accord with these rulings the life estate of A. W. Lee, appellant, is sufficient to uphold the estate in his children, though not *in esse* at the time, by way of contingent remainder till they were born, and thereafter as owners of a vested remainder.

We are of opinion that the question presented has been correctly decided by his Honor, and his judgment is

Affirmed.

J. F. McCALL v. TEXTILE INDUSTRIAL INSTITUTE AND J. R. HOOVER.

(Filed 21 May, 1924.)

1. Principal and Agent—Deeds and Conveyances—Contracts.

Where there is evidence that one representing himself to be the agent of the owner of land called on the proposed purchaser in pursuance of a telephone conversation he had had with the principal, and entered into a written contract to convey the lands in behalf of his principal, upon certain conditions, it is with the other evidence in this case: *Held,* sufficient to be submitted to the jury upon the question of agency and to bind the owner under the provisions of the statute of frauds.

2. Same—Signature—Evidence Aliunde—Questions for Jury—Statute of Frauds.

Where there is evidence that the one acting as the agent of the owner of lands signed his own name to the written contract of sale, in a space left for the witnesses, it is competent to show *aliunde* as an issue for the jury that he had signed in behalf of his principal, and that the latter was thereby bound under the statute of frauds; and *semble*, it could also be so shown as to an undisclosed principal.

APPEAL by plaintiff from *Ray, J.*, at December Term, 1923, of TRANSYLVANIA.

This was an action against the Textile Industrial Institute and J. R. Hoover to enforce the specific performance of a contract to convey certain lands in Transylvania County upon an alleged written memorandum of contract, 26 February, 1923, which the defendants had later undertaken to convey at the same purchase price to another company.

The plaintiff offered in evidence a paper-writing as follows:

AGREEMENT TO SELL AND BUY.

In consideration of the sum of five hundred dollars this day received from J. F. McCall and R. R. Fisher, of Transylvania County, purchasers of the following described property, all those seven tracts of land in Transylvania County, N. C., now owned by Textile Industrial Institute and J. R. Hoover, containing 1,018 acres, more or less, the purchase price being $10,000, seller to pay commissions. And upon payment of the further sum of $3,000 within thirty days from this date, and the execution of note and mortgage for $6,500 on the above-described property, payable as follows, $3,250 in six months from date and $3,250 in twelve months from date, bearing interest from date at the rate of 6 per cent per annum, sellers covenant and agree and bind themselves and their heirs, executors, administrators, successors, and assigns to convey the above-described property to the said J. F. McCall and R. R. Fisher, their heirs, executors, administrators or assigns, in fee by quit-claim deed, with dower duly renounced, free from encumbrances except such as are herein agreed to be assumed. And upon tender of such deed the purchaser agrees to fully comply with the terms of this contract of sale. All taxes for 1923 to be paid by purchasers; interest, rents and insurance to be prorated to date of the consummation of sale.

Upon failure of the purchaser to comply with the terms hereof within the stipulated time, the seller to have the right to retain the amount this day paid, or to enforce the performance of this contract according to law.

In witness whereof, we have hereunto set our hands and affixed our seals, this 26 February, 1923.

.....(L. S.)
Seller.
.....(L. S.)
Seller.
J. F. McCALL. (L. S.)
Purchaser.
R. R. FISHER. (L. S.)

Signed, sealed and delivered in the presence of:
J. W. ALEXANDER.
MARY SAMOINE.

NORTH CAROLINA—Transylvania County.

The due execution of the within contract was this day acknowledged before me by J. F. McCall, one of the makers thereof, for the purpose therein expressed. Therefore let the contract and this certificate be registered.

Witness my hand and seal, this 29 March, 1923.

N. A. MILLER, C. S. C.

Filed for registration 29 March, 1923, at 4 o'clock p. m., and recorded 30 March, 1923, in Book No. 47, at page 152.

ROLAND OWEN,
Register of Deeds, Transylvania County.

The witness McCall testified: "This is a check I gave in Spartanburg, 26 February, 1923, to J. W. Alexander, agent of the Textile Industrial Institute, for five hundred dollars. It is endorsed 'J. W. Alexander, Agent of the Textile Industrial Institute.' It has been paid. It came back to me in regular course through the bank."

The check is as follows:

PISGAH BANK.

BREVARD, N. C., 26 February, 1923.

Pay to the order of J. W. Alexander, agent for the Textile Industrial Institute, five hundred and no-100 dollars.

To Pisgah Bank, Brevard, N. C.

For land—1,018 acres. J. F. McCALL.

Endorsement: J. W. Alexander, Agent for Textile Industrial Institute.

Paid 3 March, 1923. Paying teller: Pisgah Bank, Brevard, N. C.

At the close of the evidence the court directed a nonsuit, and plaintiff appealed.

D. L. English and C. B. Deaver for plaintiff.
W. L. Breese for defendants.

CLARK, C. J. There was evidence sufficient to be submitted to the jury offered to show that J. W. Alexander was the agent of the defendants.

The nonsuit was evidently entered by the court on the ground that there was not a sufficient signing under the statute of frauds. It was in evidence that the plaintiff, McCall, got in touch over the phone with Dr. Camak, president of the Textile Industrial Institute, and through him met the real estate agent, J. W. Alexander, who stated that he was acting as agent for defendants in the sale of the property. The plaintiff showed declarations and letters of the president of the Textile Industrial Institute sufficient to submit to the jury to show that Alexander was acting as agent for the defendants.

The alleged contract was duly acknowledged by J. F. McCall and probated by him. The plaintiff also exhibited a check for $500 dated 26 February, 1923, the same day as the deed given by McCall to "J. W. Alexander, agent for the defendant, Textile Industrial Institute," which was duly cashed, and also plaintiff tendered to the defendants, through J. W. Alexander, as the second payment $3,000 called for in the deed, which the defendant refused to accept.

The defendants in their answer admitted that the property in question had been placed with J. W. Alexander, a general real estate agent, for sale, and the question depends upon whether the signature at the bottom of the contract entered in the manner it was, was intended to be a signature by Alexander, and as the agent of the defendant. It is true the paper is signed at the end, but below the dotted line on which witnesses were to sign. The plaintiff contends that though the instrument was signed at the bottom in this manner that Alexander intended to sign it as a witness. Indeed the recitals in the deed tend to show that it was a contract or an agreement to sell and buy.

The acceptance by Alexander of the check to him as agent for the Textile Industrial Institute of $500, together with the evidence that he was acting as agent in the negotiation for the Textile Industrial Institute, makes it a question of fact whether the signature of J. W. Alexander was placed on the contract as such agent. The plaintiff contends that there was no possible reason why he should have signed it as a witness, especially in view of the evidence amply sufficient to go to the jury of his agency from the defendant, the Industrial Institute, for the sale of the property.

In 25 R. C. L., 686 (sec. 324), it is said, with full citation of authorities: "If an agent is duly authorized to make the contract in behalf of his principal, the memorandum, though signed by the agent in his own name, may be sufficient to satisfy the statute as the statute does not require that the signature be in the name of the principal, and the signature of the agent in such case is deemed the signature of the principal. The statute does not exclude parol evidence that a written contract for the sale of goods or land purporting to be between the seller and buyer was in fact made by the buyer only as agent for another for the purpose of charging the principal."

To the same purport is *Neaves v. Mining Co.,* 90 N. C., 412, that a draft signed by an agent is a sufficient memorandum of contract to fill the condition of the statute of frauds and bind the principal, though the name of the latter does not appear in the instrument. The authority of the agent may be shown *aliunde,* and such authority need not be in writing. In this case the check was made payable to the order of "J. W. Alexander, agent for the Textile Industrial Institute; five hundred and no-100 dollars," and recites that it was for "land—1,918 acres." And it was in evidence that the said check was cashed by Alexander; and, as already stated, there was evidence sufficient to go to the jury to show that he was acting in the transaction as the agent of the defendant, the Textile Industrial Institute, and that the second payment of $3,000 was tendered in due time according to the terms of the paper-writing, and that the balance of the specified sum was also duly tendered.

The above case of *Neaves v. Mining Co.* cites numerous authorities to the same effect, and it has been often cited since, and has been reprinted with annotations in 47 Am. Dec., 529.

Also in 25 R. C. L., 657 (sec. 291), it is said, with many citations: "The statute (of frauds) does not change the law as to the rights and liabilities of principals and agents, either as between themselves or as to third persons. Its provisions are complied with if the names of competent contracting parties appear in the writing, and if a party is an agent it is not necessary that the name of the principal be disclosed. Accordingly if a contract, within the provision of this statute, is made by an agent, whether the agency is disclosed or not, the principal may sue or be sued as in other cases."

Neaves v. Mining Co. has been cited and approved to the same effect in *Hargrove v. Adcock,* 111 N. C., 171, that it is "a sufficient compliance with the statute if the agent signs his own name instead of that of his principal by him"; and in *Hall v. Misenheimer,* 137 N. C., 186, and more recently in *Burriss v. Starr,* 165 N. C., 657.

There was ample evidence to be submitted to the jury that J. W. Alexander was the agent of the defendant, the Textile Industrial Institute, to sell this land, and if he was such agent, the manner in which it was signed was sufficient without reciting in the signature that he was agent.

The only question that can arise, if the jury shall find that he was the agent of the defendants, is upon the location of the signature, the defendant contending that it shows that Alexander signed only as a witness. The plaintiff contends that there is nothing that so indicates and no fact nor reason that he should have signed other than as agent.

This was a question of fact upon all the evidence, whether the affixing of the signature in that place and manner was done by Alexander as agent or not. This was a fact which calls for ascertainment by a jury, and in nonsuiting the plaintiff there was

Error.

NOTE.—This opinion was written in accordance with the Court's decision and filed, by order of the Court, after *Chief Justice Clark's* death.

SOUTHERN STATE BANK v. C. F. SUMNER AND WIFE, MINNIE SUMNER.

(Filed 21 May, 1924.)

1. Actions—Suits—Equity—Cloud on Title—Statutes.

C. S., 1473, giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands.

2. Deeds and Conveyances—Acknowledgments—Husband and Wife—Married Women—Telephones.

C. S., 997, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by sections 3323 and 3324, as to acknowledgments of grantors and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her.

APPEAL by defendant from *Ray, J.*, at November Term, 1923, of HENDERSON.

BANK *v.* SUMNER.

Civil action. Plaintiff having acquired title to 7/8 of a tract of land in Henderson County, institutes the present suit to remove certain clouds on his title, one arising by reason of a docketed judgment in favor of Steven Putney Shoe Company against defendant C. F. Sumner, and purporting to have been assigned for value to his wife and codefendant, Minnie Sumner, and constituting an apparent lien on the property. The second, by reason of an inchoate right and claim to dower in said land as wife of C. F. Sumner.

It appeared that plaintiff's title rested on a foreclosure sale under a mortgage on the land by C. F. Sumner and wife, and this alleged cloud upon plaintiff's title is due to the fact that the acknowledgment and privy examination of *feme* defendant was taken by the notary over the telephone and not otherwise, this being testified to by both plaintiff and defendant's witnesses, and *feme* defendant objects to any judgment precluding her from asserting her dower right when and wherever same may have become consummate.

On an issue submitted as to the privy examination of *feme* defendant, the judge charged the jury in effect that if the acknowledgment and privy examination was had over the telephone the same was valid. Verdict on the issue for plaintiff, and thereupon the court entered judgment:

"And it also appearing from the pleading and from the verdict of the jury that the plaintiff is entitled to judgment against the defendant Minnie Sumner as to all matters involved in this action, it is therefore, on motion of T. J. Rickman and Shipman & Justice, counsel for plaintiff, ordered, adjudged and decreed that the plaintiff is the owner in fee simple of its alleged undivided seven-eighths interest in the land described in the complaint, free and discharged from any and all claims of said defendant; that the judgment and assignments thereon mentioned and referred to in the complaint as constituting a cloud upon the plaintiff's title, and that the alleged claim of an inchoate right of dower in said land set up by the defendant Minnie Sumner in her answer as constituting a cloud upon the plaintiff's title, be and they are hereby declared null and void and of no effect, and that the same be and they are hereby removed as clouds upon the plaintiff's title. It is further ordered and adjudged that the plaintiff recover its costs incurred in this action, to be taxed by the clerk."

From this judgment *feme* defendant excepted and appealed.

T. J. Rickman and Shipman & Justice for plaintiff.
D. L. English and O. K. Bennett for defendant.

HOKE, J. Our statute making provision for the quieting of titles, C. S., 1743, is much broader in its scope and purpose than the equitable

remedy as formerly allowed and administered in this jurisdiction. Speaking to the subject in *Satterwhite v. Gallagher,* 173 N. C., at p. 528, the Court said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs."

Under this construction the remedy sought would extend to and include the causes for relief set up in the complaint, both the apparent liens arising from a docketed judgment and the potential claim of the *feme* defendant to her inchoate right of dower.

As to the first, there is no denial in the answer as to the existence of the docketed judgment, its payment, and the other pertinent facts concerning it set forth in plaintiff's verified complaint, and the judgment for plaintiff as to that claim is affirmed. On the second claim, however, we are of opinion that the objection made by the *feme* defendant and insisted on in this appeal is well taken, and must hold that on the evidence as submitted by both plaintiff and defendant there has been no proper acknowledgment or privy examination as to the execution of the mortgage deed on the part of the appellant. The statute making provision for the proper mode of conveyances of real property by a husband and wife: "Her lands, tenements and hereditaments," C. S., 997, both in its terms and purpose, clearly contemplates that the acknowledgment provided for and the privy examination of the wife shall be had in the personal presence of the officer, and that therefore such acknowledgment over the telephone will not suffice. If any doubt could exist from a perusal of the section referred to it is put to rest by the further provisions of the statute, sections 3323, 3324, in terms as follows (C. S., 3323): "Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance

as follows: I (here give the name of the official and title) do hereby certify that (here give the name of the grantor) personally appeared before me this day and acknowledged the execution of the foregoing instrument," etc. And section 3324: "When an instrument purports to be signed by a married woman, the form of the certificate of acknowledgment and private examination before any officer authorized to take the same shall be in substance as follows: I (here give name and title of officer) do hereby certify that (here give name of the married woman), wife of (here give name of husband), personally appeared before me this day and acknowledged the due execution of the foregoing instrument, and the said (give name of married woman), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her husband or any other person, and that she does still voluntarily assent thereto."

No officer could lawfully and truthfully make such a certificate in form or substance except on an official and personal interview with the wife, separate and apart from her husband, and the attempted examination over the telephone must be held a nullity. The decided weight of authority also is in support of the position. *Myers v. Eli,* 193 Pacific, 77 (Idaho); 12 Am. Law Rep., p. 535; *Hutchinson v. Stone,* 89 Southern, 151 (Florida); *Roach v. Francisco,* 138 Tenn., 357; *Wester v. Hart,* 123 Tenn., 357.

There was error, therefore, in the ruling that the acknowledgment and privy examination taken over the telephone is valid, and on the facts as now presented there should be a judgment against the plaintiff as to the appellant's inchoate right of dower. The *feme* defendant is entitled to a new trial, and the costs of the appeal will be taxed against the plaintiff.

New trial.

CITY OF GASTONIA v. S. G. CLONINGER, GRAY MANUFACTURING COMPANY, AND W. C. ADAMS.

(Filed 21 May, 1924.)

1. Municipal Corporations—Cities and Towns—Streets—Incorporation—Highways—Statutes.

Upon the incorporation of a town, the public highways theretofore therein existing come within the municipal control as a governmental subdivision, enlarged to meet the broader usages thereof, as streets, and the authority of other governmental agencies is excluded; and the act of 1903, including all incorporated towns in Gaston County under the provisions of the act of 1895 for the better working of the public roads and highways of the county, is in conformity with this principle.

2. Same—Abutting Owners on Streets Improved—Assessments—Taxation—Peculiar Benefits—Government.

Statutes prescribing the methods of improving the streets of an incorporated city or town, regulating assessments against abutting property on the streets improved and particularly benefited, comes within the right of taxation vested in the Legislature, exercised thereunder by counties, cities and towns as governmental agencies of the State.

3. Same—Constitutional Law—Uniformity of Taxation.

It is required by the Constitution, Art. V., sec. 33, that property shall be taxed by a uniform rule; and by Art. VII, sec. 9, that all taxes levied by any county, city or town, etc., shall be uniform and *ad valorem* upon all property in the same, except property exempt by the Constitution; and while assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements.

4. Same—Contribution by County to Streets Improved—Deductions.

Where a county has, upon previous agreement with a city or incorporated town, paid a proportionate part of the cost of paving a certain street within the city, and the city has paid the balance, each, respectively, out of its general funds, the owners of land abutting on this street cannot maintain the position that from the assessment of their land abutting on the street improved there should proportionately be deducted the amount paid by the county, the same being contrary to the constitutional requirement for the uniformity of taxation in the same class or subject-matter. Constitution, Art. V, sec. 33; Art. VII, sec. 9.

APPEAL by plaintiff from *Stack, J.,* at January Term, 1924, of GASTON.

P. W. Garland for plaintiff.

A. G. Mangum and George W. Wilson for defendants.

ADAMS, J. The defendants and other property owners residing on West Franklin Avenue in the city of Gastonia presented a petition to the city council praying that the avenue be laid with an asphalt pavement between Linwood Street and the western corporate boundary, and agreed to pay one-half the total cost of the improvement, not including the cost incurred at street intersections or on the track of the street railway. The petition was granted, and it was ordered that the owners of abutting property should make all sewer, water, and gas connections on the street, and should pay one-half the total cost of the improvements, with the exceptions heretofore pointed out. For the purpose of securing uniformity it was resolved that the city should complete the work by contract or by its own forces. In pursuance of the resolution the city caused to be constructed within the designated limits of the avenue a

sheet asphalt pavement, and assessed one-half the total cost against owners of the abutting property.

The defendants appealed to the Superior Court on the ground that the assessments computed against their property were incorrect. It appeared that the General Assembly at the session of 1899 passed an act for the better working of the public roads and highways of the State, providing therein that it should apply to Gaston County, and an act in 1903, further providing that it should be construed as applying to and including all incorporated towns in the county as well as territory outside the corporate limits. Public Laws 1899, ch. 581; Public Laws 1903, ch. 533. Thereafter the city and the county entered into an agreement or arrangement, not clearly defined, by which the county in the execution of a scheme to extend the public roads through the city agreed to pave a portion of West Franklin Avenue or to contribute a portion of its funds for that purpose. The specific proposition of the county was to pave, or to contribute an amount equal to the cost of paving, a defined strip of the avenue eighteen feet in width; but the city in fact performed the work, laying the pavement the entire width of the street, which was twenty-seven feet or more. There was evidence tending to show that the total cost of the improvement was more than $35,000; that the work done by the city was paid for out of the general city fund, and that the city was thereafter reimbursed out of the county fund to the extent of $7,091.25. The amount thus paid by the county went into the general fund of the city.

The exceptions filed by the defendants to the assessments against their property are based upon the contention that the amount contributed by the county ($7,091.25) should be deducted from the total cost of paving the avenue, and that the defendants are liable only for their proportion of the cost after the deduction is made. At the trial two issues were submitted to the jury, the first involving the question whether the defendants are entitled to have deducted from their assessments one-half the amount which the city received from the county, less the sum appropriated to improving the intersection of streets, and the second involving the amount which the defendants are entitled to have credited on their respective assessments. The jury were instructed if they believed the evidence to answer the first issue "Yes" and the second "The total frontage of petitioners' property is 3,889.61 feet, amounting to 91 1-6 cents per foot." The issues were answered in this way, and his Honor thereupon adjudged that the assessments be revised, that the defendants be credited with certain sums computed on the basis of .934 per front foot, and that the city be enjoined from collecting any amount until the deductions were made. The plaintiff excepted and appealed,

and by agreement of the parties the only question presented is whether the defendants are entitled to the deduction which they claim.

It is said by Elliott in his work on Roads and Streets, sec. 504, that when a city or town is incorporated the public ways therein, that is, ways belonging to the public and not owned by private corporations, in the absence of a statute to the contrary, come within the jurisdiction and control of the municipality. The new corporation comes into existence with the rights, powers and duties of a governmental subdivision, and as to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other governmental corporations is excluded. One reason is that the ways must, of necessity, change character, that the servitude must be much extended, and that the augmented duty must require broader authority than that which is requisite for the care and control of rural roads.

We think it evident that the city's control of its streets was in no way impaired by the act of 1903, *supra,* even if the act be construed as still effective, the purpose of the Legislature no doubt being to provide a uniform system of building roads for the county, subject to the city's exclusive jurisdiction in the improvement of its streets.

In *Gunter v. Sanford,* 186 N. C., 452, we said that the statutes prescribing the method of improving the streets of a municipal corporation and regulating assessments against abutting property must be referred to the right of taxation, which is vested in the Legislature, and that counties, cities and towns are agencies of the State through whom the power is sometimes exercised.

The limitation under which the power of taxation may be exercised is prescribed by the Constitution. Article V, section 3, provides that laws shall be passed taxing property by a uniform rule, and Article VII, section 9, that all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution. See, also, C. S., 2678.

It has been held that the latter section of the Constitution was intended to engraft upon our organic law the principle of equality in taxation, but that a local assessment levied by a city or town need not be uniform and *ad valorem* upon all property. Such assessment is levied for a pecuniary benefit conferred upon land adjacent to the improvement, but here also there should be uniformity and equality of taxation in the sense that the burden imposed upon the property of each citizen should be proportionate to the advantage accruing to the property from such improvement. Therefore, if equality of taxation would be defeated by making the deduction on which the defendants insist, the judgment cannot be sustained. *Cain v. Comrs.,* 86 N. C., 8; *Shuford v. Comrs., ibid.,* 552; *Comrs. v. Comrs.,* 92 N. C., 180; *Busbee v.*

Comrs., 93 N. C., 144; *Raleigh v. Peace*, 110 N. C., 32, 38; *Harper v. Comrs.*, 133 N. C., 106; *Sanderlin v. Luken*, 152 N. C., 739; *Tarboro v. Staton*, 156 N. C., 504; *Justice v. Asheville*, 161 N. C., 62; *Forbes v. Tarboro*, 185 N. C., 59.

The principle of equality will be defeated if the credit demanded by the defendants will result in discrimination against any of the other taxpayers of the city. We are of opinion that the deduction would result in discrimination. The evidence is susceptible of the construction that the entire cost of making the improvement was paid out of the general fund of the city, and the contribution made by the county was applied *pro tanto* to replenishing the city treasury. The general fund, of course, was derived from taxes collected from all the taxpayers of the city.

If, on the other hand, the amount contributed by the county be considered a direct payment for the improvement as if the work had been done by the county, the county fund likewise was derived from taxes collected from the taxpayers of the county, including those residing in or having property in the city. However the payment may be considered the deduction allowed in the judgment would work a discrimination against taxpayers of the city other than the defendants, and would infringe the general principle of equality in taxation.

Section 16 of the act set out in *Gunter v. Sanford, supra*, directed the application of the money paid by the Highway Commission, but as we understand it, this section was merely a legislative declaration of the principle we have referred to; and in *Shute v. Monroe, ante*, 676, the legal right of deduction was not presented for decision.

We think there was error in the directed instruction to the jury.

Error.

W. H. BIVENS ET AL. V. BOARD OF EDUCATION, BOARD OF COMMISSIONERS, AND THE SHERIFF OF STANLY COUNTY.

(Filed 21 May, 1924.)

Schools—Taxation—Consolidation of Special Tax with Non-Special Tax Districts—Equal Benefits—School Terms—Statutes.

The authority given the board of education to create special school taxing districts, in which, after the boundaries are defined and recorded, an election on the question of a special tax may be held as the act requires, is to equalize in the district so formed the advantages which the schools afford; and where a special district has approved, at an election held for the purpose, a special tax to continue its schools beyond the six-months period required by the Constitution, and has later been combined

into a district with others having no special tax, or without an election held for the purpose of voting a special tax under the consolidation, the position may not be maintained by the special-tax district, thus consolidated, that it may exclusively use its special tax for the continuance of its own school term beyond that of the other portions of the district thus consolidated.

APPEAL by defendants from an order of *Shaw, J.*, continuing a restraining order to the final hearing.

The undisputed facts are as follows:

1. An election was held in what was then Aquadale School District on 14 June, 1921, for the purpose of creating a special-tax district, at which a majority of the Aquadale voters voted for a special-tax district; but on account of the alleged irregularity in the calling and holding of said election no tax was levied until after a special act of the Legislature of 1923, which validated the defects in said election.

2. On 11 June, 1923, the county board of education adopted a county-wide plan of consolidation for the county of Stanly, and in so doing they consolidated four nontax school districts with the old Aquadale School District, which district had formerly voted in favor of the special tax.

3. In the year 1923 the county commissioners for Stanly County, at the time of levying other taxes, and after the consolidation of said districts, levied a special tax in that part of the present Aquadale School District which had formerly voted the special tax.

4. The sheriff of Stanly County now has in his hands the tax books for collection and has collected about $200 of the special tax, which is now in his hands, a part of which was paid under protest.

5. Said special tax was levied in that part of Aquadale School District which had formerly voted for the special tax, for the purpose of extending the school term for all the children living in said special-tax district.

6. The county board of education has erected in said school district a handsome brick building with ten rooms from the general school funds of the county, without any cost whatever to the special-tax portion of said district, all without any cost to the non-tax portions of said district.

Upon these facts his Honor adjudged the levy and collection of the special tax in that part of the present Aquadale School District which had formerly voted the special tax to be illegal and void, and continued to the hearing the order restraining the levy and collection of the tax. The defendants excepted and appealed.

Bogle & Bogle for plaintiff.

R. L. Smith & Sons for defendant.

ADAMS, J. Under the act codifying the laws relating to public schools the board of education is given power to create special-taxing districts, in which, after the boundaries are defined and recorded, an election on the question of a special tax may be held as the act provides. Public Laws 1923, ch. 136, Art. 18; *Sparkman v. Comrs., ibid.,* 241. But in this case the county board of education merely consolidated Aquadale, which is a special-taxing district, with four other districts in which no tax has been levied or authorized. In fact no election has been called in either of these four nontaxing districts.

His Honor held in effect that a school district composed of several consolidated districts cannot be maintained half taxing and half not taxing. The advantages as well as the privileges should be equal, for the purpose of the school law, as indicated in the county-wide plan of organization, is to equalize the advantages which the schools afford. But one of the grounds on which the defendants ask a reversal of the judgment is that the tax in the Aquadale District was levied for the benefit of this district and no other. They say that section 77 applies only where two or more districts having different rates are consolidated and a tax is levied in the entire district; and they take the position that after the expiration of six months, during which the school in the consolidated district must continue, the Aquadale District may prolong the term for its own benefit under the local tax. This construction would nullify the consolidation; there would be a theoretical but not an actual consolidation of the districts within the meaning of the law. Our investigation has not disclosed any authority for holding that a segregated part of a consolidated district may be taxed even for its own benefit while the remainder of the district is exempt. The entire district should be either subject to the tax or exempt from it. Section 77 authorizes the consolidation of districts having different local tax rates, and provides that the local tax rate to be levied in the consolidated district shall be the lowest tax rate voted in any of the original districts. In construing a statute which provided that "no taxpayer in such consolidated district should be required to pay a higher special tax than that voted originally in his district," *Stacy, J.,* said: "But the statute is silent with reference to fixing the uniform rate or rates where local-tax districts or special chartered districts are combined with nonlocal-tax districts. Just here we have experienced some difficulty in applying the provisions of this enactment of the Legislature. It follows as a matter of course that if the county commissioners cannot establish for any consolidated district a rate of tax higher than that originally voted in any part of said district, and some part has voted no tax at all, then, under the clause requiring that the different rates shall be made uniform, it appears that the commissioners, in such cases, would be re-

quired to reduce the tax to nothing; or, to state it differently, in such cases they *ipso facto* would seem to be without any proper authority at all to levy these special uniform taxes throughout the entire district." *Perry v. Comrs.*, 183 N. C., 387, 392.

The defendants do not contend that the tax can be levied throughout the consolidated district, and in our opinion it cannot be levied in only a portion of the district. The judgment is

Affirmed.

BICKLEY CLOTHING COMPANY ET ALS., CREDITORS WATAUGA SUPPLY COMPANY, v. L. C. GREEN, L. W. GREEN, T. M. MORETZ, W. R. GRAGG, C. A. ELLIS, M. P. CRITCHER, G. P. HAGGAMAN, B. B. DOUGHERTY, L. F. CAMPBELL, AND J. S. McBRIDE, RECEIVERS OF WATAUGA SUPPLY COMPANY, AND MRS. FLORENCE I. MORETZ.

(Filed 21 May, 1924.)

1. Actions—Suits—Creditor's Bill—Insolvent Corporations—Receivers—Parties.

While the creditors of an insolvent corporation may, under certain circumstances, maintain a suit in equity in the nature of a creditor's bill, to establish their debts and compel a proper application of the corporation's assets to the payment of their claims, this right of action is primarily in a receiver, when one has been appointed, and he alone is the proper party to prosecute the action, unless cause is shown to the contrary.

2. Same—Misjoinder—Dismissal.

A creditor's bill against an insolvent corporation, to compel the payment of unpaid balance of subscriptions to its capital stock; fraud in the taking over and misappropriation of its funds in the management of its affairs by certain of the defendants alleged to be in control, claiming to be the owners, suits by certain individual creditors against still other defendants on separate demands or claims against the latter, is a misjoinder of parties and causes of action, and is properly dismissed in the Superior Court.

CIVIL ACTION heard on demurrer before *Finley, J.*, at September Term, 1923, of WATAUGA.

Demurrer for misjoinder of parties and of causes of action. Demurrer sustained and action dismissed, and plaintiffs excepted and appealed.

J. B. Councill and W. R. Bauguess for plaintiffs.

Brown & Bingham and W. C. Newland for defendants.

HOKE, J. Plaintiffs, thirty-two or thirty-three in number, separate creditors of the Watauga Supply Company, for themselves and all other creditors, etc., have instituted the present action in the nature of a bill in equity to realize on the assets of said company in their favor, "individually and collectively," and it is alleged, among other things, that the Watauga Supply Company is insolvent, and J. S. McBride, made a defendant, has in some proceedings, the nature of which is not definitely stated, been appointed and is now receiver of the company.

For causes of action the complaint, after stating the indebtedness of company to plaintiffs, alleges that six of defendants—Gragg, C. A. Ellis, M. P. Critcher, G. P. Haggaman, B. B. Dougherty and L. F. Campbell—were the original stockholders and have only paid in 50 per cent of the stock subscribed by them, and the other 50 per cent is due and owing, and for said balance, amounting in the aggregate to $10,000, said defendants are liable to plaintiffs, creditors of the corporation, the number of shares and the amount due from each on their respective subscriptions being specifically stated.

Plaintiffs allege further that defendants T. M. Moretz, L. C. Green and L. W. Green, claiming to have acquired the ownership of the shares of stock, and in possession and control of the company's business on and after 1 January, 1923, commenced to fraudulently dissipate the stock by the company selling the same in bulk and at prices greatly below their true value, reducing the stock and property in a short time from fifteen or twenty thousand dollars, more than sufficient to pay all the indebtedness of the company, to $3,000 or less, wrongfully and fraudulently appropriated the proceeds to their own use, and judgment is demanded for said fraud and wrongs and order of arrest sought against these named defendants.

Again it is alleged that one of plaintiffs, Cowan, Mahoney & Co., has a valid claim by note due and unpaid against T. M. Moretz, L. C. Green and L. W. Green amounting to $1,100 and interest. And further, that the Credit Clearing House of Knoxville, Tenn., holds notes aggregating $1,453.05 against the company, in trust for three of the individual plaintiffs, and endorsed by two of the defendants, L. C. Green and Mrs. Florence I. Moretz, and demands judgment: That plaintiffs recover judgment for the balance due from the original subscribers for unpaid stock subscriptions. Second, that Cowan-Mahoney Co. have judgment on the note signed by J. M. Moretz, L. C. Green and L. W. Green. That the beneficiaries of the amount due in trust to the Credit Clearing House of Knoxville have judgment for $1,453.05 against Mrs. Florence Moretz as guarantor of said indebtedness.

It is recognized that the creditors of an insolvent corporation may, under proper circumstances, maintain an action in the nature of a bill

in equity against the company and others to establish their debts and compel a proper application of the company's assets to their claims. When it appears, however, that a receiver has been appointed, the rights of action to realize on the company's property is primarily in him, and it is usual to require that they be prosecuted by him unless cause is shown to the contrary. 7 R. C. L., p. 387, citing *Cushing v. Perot,* 175 Pa. St., p. 66, and other cases.

Conceding that this of itself may at times be treated as only a defective statement of a cause of action, curable by appropriate amendment, when a number of individual creditors undertake for themselves and others to realize on the assets of the corporation by suits against third persons, they must assert their claims by orderly procedure and conform to the rules prevailing in such cases, one of them being that a misjoinder of both parties and causes of action is a fatal defect.

Considering the present complaint in view of this position, it is clear that the record presents such a misjoinder, both of parties and causes of action, embracing a suit by creditors against the original stockholders for unpaid balances due on their original subscriptions; second, a suit by such creditors against three other defendants alleged to be in control of the property and goods of the corporation, claiming same as owners for fraudulent dissipation of these assets; third, suits by certain individual creditors against still other defendants on a separate demand or claim against the latter, and, under our decisions applicable, the court below has correctly ruled that the cause be dismissed. *Rose v. Warehouse Co.,* 182 N. C., 107; *Roberts v. Mfg. Co.,* 181 N. C., 204; *Thigpen v. Cotton Mills,* 151 N. C., 97; *Cromartie v. Parker,* 121 N. C., 198.

Judgment affirmed.

G. H. GOVER, TRUSTEE IN BANKRUPTCY OF THE CONSUMERS TIRE AND SUPPLY COMPANY, v. R. MALEVER.

(Filed 21 May, 1924.)

Corporations—Subscription to Shares of Stock in Property—Directors—Statutes—Evidence—Nonsuit.

C. S., 1157, makes the judgment of the board of directors in fixing the value of property of its subscribers to its shares of stock to be accepted in lieu of money arbitrary and of artificial weight, in the absence of fraud; and where there is no evidence of fraud therein, a judgment as of nonsuit is properly granted.

CLARKSON, J., did not sit.

GOVER *v.* MALEVER.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1923, of MECKLENBURG.

Plaintiff, trustee in bankruptcy of the Consumers Tire and Supply Company, brings suit against the defendant, and sets out in his complaint two separate and distinct causes of action:

1. To recover upon a stock subscription, alleging the defendant had transferred to the corporation property of inadequate value in payment of his stock.

2. To recover moneys paid defendant from the funds of the corporation by its president on a personal debt.

Defendant contended, as to the first cause of action, and offered evidence tending to show, that his stock subscription had been fully paid by the transfer of property regularly and duly valued and accepted by the directors of the corporation; and, as to the second cause of action, he offered evidence tending to show that the president of the corporation had reimbursed it for the moneys which he had paid defendant from its funds.

From a judgment of nonsuit on the first cause of action, and a verdict and judgment in favor of the defendant on the second cause of action, the plaintiff appeals, assigning errors.

C. W. Tillett, Jr., for plaintiff.
Parker, Stewart, McRae & Bobbitt for defendant.

PER CURIAM. Without stating the facts, which are somewhat complicated and make a rather long story, we are convinced, from a careful perusal of the record, that the plaintiff's first cause of action was properly dismissed as in case of nonsuit. It was made to appear, without contradiction or suggestion of fraud, that the directors of the corporation duly and regularly valued and accepted the property transferred to it by the defendant in full payment of his stock. C. S., 1157, provides: "Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property, or labor performed. Any corporation may issue stock for labor done, or personal property, or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive."

It will be observed that the statute gives to the defendant's evidence, when his case is brought within its terms, as it is here, an arbitrary and artificial weight, making the judgment of the directors as to the value of the property, etc., conclusive in the absence of fraud. Hence,

in the absence of any evidence tending to show fraud in the transaction, there would be no mooted question for the jury. In *Goodman v. White,* 174 N. C., 399, the defendant failed to bring himself within the terms of the statute, and this denied to him its conclusive benefit.

Technically, and as a matter of accurate form, a motion for a directed verdict might have been more appropriate; but as no harm has come to the plaintiff, the judgment will be allowed to stand. *Rankin v. Oates,* 183 N. C., 520. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215.

A careful examination of the exceptions and assignments of error, addressed to the trial of the second cause of action, leave us with the impression that no reversible or prejudicial error has been made to appear. The record presents no new or novel point of law, or question not governed by our former decisions. We deem it unnecessary to discuss the exceptions *seriatim.*

The verdict and judgment will be upheld.

No error.

CLARKSON, J., did not sit.

JOHN H. HAYES v. JOHN H. GREEN AND J. A. HARPER, ADMR. OF H. A. FEIMSTER.

(Filed 21 May, 1924.)

1. Bills and Notes—Negotiable Instruments—Possession—Title—Presumptions—Evidence—Nonsuit.

In an action upon a negotiable note by one claiming as holder in due course, where the payee or his administrator has intervened and produces the note, upon the trial, not endorsed or assigned, the legal title is presumed to be in the intervener; and, without further evidence, a judgment in his favor against the plaintiff as of nonsuit is properly allowed, and the intervener is entitled to recover thereon against the maker.

2. Same—Statutes.

While the possession of a negotiable note by one claiming in due course raises the presumption against the maker that such holder has the legal title, this presumption does not extend to the payee of the unindorsed note. C. S., 3040.

APPEAL by plaintiff from *Long, J.,* at January Special Term, 1924, of BURKE.

HAYES *v.* GREEN.

Civil action, to recover upon six promissory notes. From a judgment of nonsuit plaintiff appeals.

Councill & Yount for plaintiff.
Avery & Ervin and Spainhour & Mull for defendant Harper.

STACY, J. On 29 March, 1918, the defendant John H. Green executed and delivered to H. A. Feimster six negotiable promissory notes, aggregating $700.00, and secured by mortgage on real estate. The notes were made payable to H. A. Feimster or order. The plaintiff alleges that said notes and mortgage were duly delivered and transferred to him by H. A. Feimster, or his agent, for full value and before maturity, but none of these instruments bear any endorsement of the payee. H. A. Feimster is now dead; his administrator, J. A. Harper, has intervened in this suit and set up claim to said notes and mortgage. The defendant John H. Green admits the execution and delivery of the notes and mortgage in question, and stands ready to pay the same as soon as the plaintiff and J. A. Harper, administrator, can determine, as between themselves, the question of title to said instruments.

At the close of all the evidence the defendant's motion for judgment as of nonsuit was allowed.

While the administrator of H. A. Feimster appears on the record as a party defendant, it is conceded that he really came into the case as an interpleader or intervener. The notes and mortgage were offered in evidence by him. They were made payable to his intestate and were not endorsed or assigned by any one. The legal title, therefore, was in the intervener, J. A. Harper, administrator. *Robertson v. Dunn,* 87 N. C., 191. Conceding that said notes and mortgage were in the possession of the plaintiff, which made out a *prima facie* case of ownership as against the maker, John H. Green (C. S., 3040; *Jackson v. Love,* 82 N. C., 405), this *prima facie* case, or presumption of ownership, would not extend to the payee, or his administrator, who held the legal title to them. *Holly v. Holly,* 94 N. C., 670.

Nothing else appearing, his Honor was correct in holding that the intervener was the owner of said notes and mortgage and entitled to their collection. *Vann v. Edwards,* 130 N. C., p. 72; *Bank v. Drug Co.,* 152 N. C., 142; 50 L. R. A. (N. S.), 581, and note.

Affirmed.

FLORENCE THOMAS, BY HER NEXT FRIEND, BEULAH THOMAS, v. R. S. CLAY, ADMR., WITH THE WILL ANNEXED, AND TRUSTEE OF THE ESTATE OF FLORENCE I. THOMAS, DECEASED.

(Filed 21 May, 1924.)

1. Wills—Trusts—Charity—Indefiniteness of Beneficiary—Estates—Remainders—Descent and Distribution.

A bequest of the income from the proceeds of sale of testatrix's entire estate to her son and granddaughter in certain proportions, and then to the survivor for life, with ulterior limitation to such objects of charity as the executor may consider as in accordance with her wishes, first the son and then the executor having predeceased the granddaughter: *Held*, an active trust is created, and, the *cy pres* doctrine not obtaining in this State during the life of the granddaughter, the ulterior limitation to charitable objects is void for indefiniteness, no discretionary power being thus given to the administrator with the will annexed, and at the death of the granddaughter the estate reverts to the testatrix's heirs at law, under the doctrine of resulting trusts.

2. Same—Education and Advancement.

The income of an estate devised and bequeathed in trust, to be used for the education and "accomplishment" of the granddaughter of testatrix until she becomes twenty-one years of age, and then the income to be paid direct to her by the trustee named in the will, evidences the testatrix's intent that the trustee may use so much of the income during the minority of the beneficiary as in his sound judgment and discretion may be necessary for her food, raiment, education, and accomplishment.

3. Same—Lapsed Legacies—Devises.

The executor, with power of sale, holding in trust under the terms of the will the proceeds from the sale of the property of the testatrix's estate in trust to pay the income to her son and daughter, may sell and convey a lapsed legacy in lands, and hold the proceeds under the trust imposed on him by the will.

CIVIL ACTION, heard before *Ray, J.*, at September Term, 1923, of McDOWELL.

Appeal by defendant.

Merrimon, Adams & Johnston for plaintiff.
Morgan & Ragland for defendant.

CLARKSON, J. The plaintiff Florence Thomas is an infant, about six years of age, and the plaintiff Beulah Thomas, her mother, has been duly appointed her next friend for the purpose of bringing this action to construe the will of Florence I. Thomas, deceased, and ascertain her rights under said will. E. A. Thomas died in McDowell County, leaving considerable property, which he willed to his wife, Florence I. Thomas. This will was duly probated in McDowell County, N. C. The

said Florence I. Thomas and E. A. Thomas had one son, Emmett Thomas, who is now dead, having been killed in an automobile wreck on or about 17 July, 1922. Emmett Thomas married the plaintiff Beulah Thomas, next of friend to Florence Thomas, and Florence Thomas is the only child of this marriage. On or about 25 June, 1917, Florence I. Thomas made a last will and testament. She died in McDowell County, N. C., in March, 1920, and, shortly after her death, in the same month, her will was duly probated in McDowell County, N. C. The will is as follows:

"NORTH CAROLINA—McDowell County.

"I, Florence I. Thomas, being of sound mind, do make and declare this my last will and testament:

"1. I bequeath and devise to R. F. Burton, in trust for the uses and purposes hereinafter named, all of my property and the proceeds from the sale of the same, both personal and real, by my executor, as hereinafter directed, except the articles hereinafter given and bequeathed to my granddaughter, Florence Thomas.

"2. It is my will that my executor, hereinafter named, shall immediately after my death take possession of all my property, both personal and real, and sell the same for cash, at public or private sale, in such manner and at such time as he shall deem best, and, at the close of his administration of my estate, that all funds and property belonging to my estate shall, after final settlement with said executor, be delivered and turned over, through the court, to the said R. F. Burton, trustee, who shall invest the same in United States bonds, State, county, or other municipal bonds, or loan the same upon good security, as he may deem best, using abundant precaution against risk, and from the proceeds realized, in interest or net income, pay my son, Emmett Thomas, a sum equal to two-thirds of the average income per month realized by said trustee from the property in his hands.

"3. It is my will that the excess or remaining one-third of income from my property, above the amount hereinabove directed to be paid my said son monthly, shall be held and invested for the benefit of my granddaughter, Florence Thomas, by said trustee, in such securities as he shall deem best, or loaned, in his discretion, for the purpose of creating a fund to be expended by said trustee in the education of my said granddaughter, to be expended for that purpose by him; and if my said son should die before my said granddaughter, that after his death all of the income from my said property shall be held and used as provided in this my last will for her; and if my said granddaughter should die before my said son, that after her death all of the income from my said property shall be paid to him as provided in this my will; and after my

said granddaughter shall reach the age of twenty-one years, that the income provided for her use shall be paid to her annually, or semi-annually, or at such times as said trustee shall deem best within each year, considering her situation and the uses that are likely to be made of the money, to the end that she may realize the greatest good from the same.

"4. It is my will that my said trustee shall expend no portion of the principal derived from the sale of my property for any purpose, except, first, for the reasonable education and accomplishment of my said granddaughter, in case or in so far as the income, above the amount to be paid monthly to my said son, should be insufficient to educate her; second, in case my said son, Emmett Thomas, should become permanently disabled, by reason of prolonged affliction in health, to support himself by industrious effort, for his maintenance and support; third, in case my said granddaughter, Florence Thomas, should become so seriously and permanently afflicted in health as to necessitate her having special nursing—that is, special nursing by persons other than relatives, especially employed for that purpose, for medical attention and treatment, in either of which cases it is my will that such portion of the principal as may be absolutely necessary for such purpose may be used therefor by said trustee.

"5. It is my will that said trustee, hereinabove named, shall, so long as he executes the trusts herein provided for the expenditure of any of the principal as herein provided, but in case said trustee should for any purpose not act, or, on account of his death, or for any other purpose should cease to act as trustee, it is my will that a trustee be substituted to carry out and fully execute the trusts herein provided for, but not according to his discretion and judgment as to the necessity of expending any portion of the principal for the purpose above named, it being my will that in case such necessity for the expenditure of any of the principal for the purposes hereinabove named, to wit, the education of my said granddaughter, or on account of the permanent affliction of my said son, or of my said granddaughter, should arise, or should be thought to have arisen, that the court should be applied to, and proper orders taken for such expenditures, after careful inquiry into the matter by the court.

"6. At the death of my said granddaughter, Florence Thomas, it is my will that such money and property as shall then remain in the hands of the trustee shall be permanently invested by him in such worthy objects of charity as he shall determine upon as being in accord with what my wishes and tastes in that direction were when living, and final settlement shall then be had, with the court closing the administration of the funds herein provided for.

"7. I give and bequeath to my granddaughter, Florence Thomas, my piano, the case of books, consisting of standard works, etc., my cedar chest, my mahogany bureau and large mahogany bed, my jewelry and silverware, to be delivered to her by said trustee when she arrives at the age of 18 years.

"8. It is my will that R. F. Burton shall act as, and I do hereby constitute and appoint him, my executor, to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same.

"9. It is my will that said trustee shall be required to execute such bond, before entering upon his duties, as is by law required of guardians, and that he shall receive the compensation for his services provided by law for guardians.

"10. It is my will that my said son, Emmett Thomas, shall be permitted by said trustee to occupy the house and lot where he now lives, the Baber house, as a dwelling for himself, without the payment of rent, and that it be rented by said trustee to some other person at such time or times as it shall not be occupied by my said son as his home, while he shall live, and that it shall then be sold by said trustee.

"In witness whereof, I, the said Florence I. Thomas, have hereunto set my hand and seal, on this 25th day of June, 1917.

"FLORENCE I. THOMAS. (Seal)

"Signed, sealed, published and declared by the said Florence I. Thomas to be her last will and testament, in the presence of us, who, at her request and in her presence, do subscribe our names as witnesses thereto.

"T. A. MORPHEW,
"LOUIS G. BEALL."

Immediately after the said last will and testament of the said Florence I. Thomas was probated, the said R. F. Burton qualified as executor and also as trustee, and acted and continued to act as such executor and trustee until his death, on or about 1 November, 1921; that thereafter the defendant R. S. Clay was appointed by the Superior Court of McDowell County as administrator, with the will annexed, and trustee of the estate of the said Florence I. Thomas, deceased.

The plaintiffs contend: "That item 6 of said last will and testament of said Florence I. Thomas is utterly void, and upon the death of the said Emmett Thomas the whole of said estate was vested in the said Florence Thomas, and that she is now entitled to the immediate possession, right, title and enjoyment of all of said estate; that in any event she is entitled to the immediate use, benefit and enjoyment of the whole of the income of said estate; that the residuary clause in said will is

absolutely null and void, and that upon the death of the said Emmett Thomas, aforesaid, the plaintiff being the only child, heir at law and next of kin of the said Emmett Thomas and the said Florence I. Thomas, and of the said E. A. Thomas, that said estate, and the whole of it, immediately vests in her, and that she is entitled to the immediate possession and enjoyment of the same and the whole in fee."

The defendant contends that plaintiff's construction of the last will and testament is incorrect as to item 6.

The court below rendered the following judgment: "This cause coming on to be heard at this, the regular September, 1923, Term of the Superior Court of McDowell County, and being heard before the Hon. J. Bis Ray, judge, upon the allegations and admissions contained in the pleadings, and upon the argument and admissions of counsel made, when and where the court finds the following facts and adjudges as follows:

"The court finds as a fact that the property in question and involved in this litigation was originally the property of E. A. Thomas, and that said E. A. Thomas died in McDowell County, leaving a will, devising the same to Florence I. Thomas, and that said property was the only property of which the said Florence I. Thomas was ever seized; that the only child, heir at law and next of kin of the said E. A. Thomas and Florence I. Thomas was Emmett Thomas; that Emmett Thomas has since died and left surviving him the plaintiff, Florence Thomas, who is the only child, next of kin and heir at law; that the said Florence Thomas is the only representative of the entire family of the said E. A. Thomas, of Florence I. Thomas and of Emmett Thomas.

"The court further finds as a fact that it is utterly impossible to ascertain or determine the beneficiary, or beneficiaries, under item 6 of the will; that there is no one who knows or is able to tell what would be in accord with the wishes and tastes of the said Florence I. Thomas in this respect when living; that the said item 6 of the will is so vague, indefinite and utterly incapable of determination at any time that the same is utterly void and ineffectual.

"Now, therefore, it is considered, ordered and adjudged by the court that item 6 of the will of Florence I. Thomas is void, and as the trust estate attempted to be created was made for the purpose of carrying out said void provision, the court adjudges that the entire estate of the said Florence I. Thomas is now vested in fee in the plaintiff, Florence Thomas.

"It is further adjudged by the court that the defendant forthwith account for, all and singular, the matters and things in his hands, and that the same be turned over to the guardian for the said Florence Thomas, to be appointed by the court."

The main controversy is over item 6 of the will, which is as follows: "6. At the death of my said granddaughter, Florence Thomas, it is my will that such money and property as shall then remain in the hands of the trustee shall be permanently invested by him in such worthy objects of charity as he shall determine upon as being in accord with what my wishes and tastes in that direction were when living, and final settlement shall then be had, with the court, closing the administration of the funds herein provided for."

The matter has been recently before this Court.

W. H. Perkins, in his will, expressed a desire "that his widow, Nannie E. Perkins, 'should devise any property he had devised and bequeathed to her to the person or persons who had been the kindest to us in our old age, whether such person be kinsman or stranger,' thereby investing in her a personal discretion which she never exercised, and which no person except her could exercise, it being her sole and only province to determine who had been the kindest to W. H. Perkins and herself in aiding and comforting them in their old age." It was held that, by reason of the uncertainty of the beneficiary and the failure to designate one, that the provision of the will was inoperative and void. *Weaver v. Kirby,* 186 N. C., 390, and cases cited.

In this State the *cy pres* (as near as possible) doctrine does not prevail, as in England. There the chancellor can administer a fund by which the intention of the party is carried out *as near as may be,* when it would be impossible or illegal to give it literal effect.

It is well settled in this State and others that to constitute a valid trust, undoubtedly three circumstances must concur — (1) sufficient words to raise it, (2) a definite subject, (3) and an ascertained object. Bispham Equity (9 ed.), sec. 95.

"It is well established by an unbroken line of decisions that there must be found within the terms of the declaration of trust a *cestui que trust,* and if there is no certain and complete beneficiary named who may come into a court of equity and claim and establish their right to the fund and to the trust, it will be void for uncertainty." 25 R. C. L., 1189, and cases cited, among others, *Witherington v. Herring,* 140 N. C., 497.

In the *Witherington case, supra,* the Court uses this language: "It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it, and the beneficiary." Where the object of the bequest is indefinite and uncertain, it is held to be void. *Holland v. Peck,* 37 N. C., 255; *Hester v. Hester, ibid.,* 340; *Bridges v. Pleasant,* 39 N. C., 26. In *Keith v. Scales,* 124 N. C., 516, there is a full and elaborate discussion and citation by

Clark, J. (now C. J.). *Hadley v. Forsee,* 203 Mo., 418; 14 L. R. A. (N. S.), 1; *Fifield v. Van Wyck,* 94 Va., 557; *Fairchild v. Edson,* 154 N. Y., 199.

In *Wilcox et al. v. Attorney-General,* 207 Mass., 198; Anno. Cases, 1912 A, p. 833, it is said: "Even though a general purpose to devote the residue of the testator's estate to charity is apparent from the will, yet when the trustee is not given discretion to select the charitable objects, and the objects finally to be selected are not designated and can be ascertained only by resorting to the testator's oral communications to the trustee and another person, the trust is too indefinite to be enforced." "Where the residue of the testator's estate is devised for charitable purposes, and the charitable trust attempted to be created is declared invalid, the residue goes to the heirs at law by way of a resulting trust." *Goodale v. Mooney,* 60 N. H., 528; 49 Am. Rep., 334; *Brennan v. Winkler,* 37 S. C., 457.

"There must be a donor, a trustee competent to take, a use restricted to charitable purpose and a definite beneficiary." *Grimes v. Harmon,* 35 Ind., 198; 9 Am. St. Rep., 690.

Under the authorities in this State and elsewhere, we are of the opinion that at the death of the testatrix's granddaughter, Florence Thomas, item 6 is inoperative and void by reason of the indefiniteness of the bequest; the words, "in such worthy objects of charity as he shall determine upon as being in accord with what my wishes and tastes in that direction were when living," being void for uncertainty. The property, at the death of Florence Thomas, the trust results, or reverts, to the heirs or next of kin of the testatrix, Florence I. Thomas.

We think the case of *Trust Co. v. Ogburn,* 181 N. C., 324, consonant with the position taken in this case.

"Whenever the intention is to create a trust which cannot be disposed of to charitable purposes and is too indefinite to be disposed of to any other purpose, the property remains undisposed of, and reverts to the heirs at law or next of kin, according to its nature." *Haywood v. Craven,* 4 N. C., 360; *Stevens v. Ely,* 16 N. C., 493.

"It is certainly a general rule that where the property is given upon a clear trust, but for uncertain objects, the subject of such trust is regarded as undisposed of, and the benefit of the trust reverts to those to whom the law gives the property in default of disposition by its owner." *Holland v. Peck, supra.*

Adams, J., in *Reid v. Neal,* 182 N. C., 199, says: "In the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy," citing *Johnson v. Johnson,* 38 N. C., 426; *Winston v. Webb,* 62 N. C., 1; *Robinson v. McIver,* 63 N. C., 645; *Twitty v. Martin,* 90 N. C., 643.

What shall be done with the property until the death of the plaintiff, Florence Thomas? The defendant R. S. Clay, administrator, with the will annexed, and trustee of the estate of Florence I. Thomas, or his successor or substitute trustee, shall carry out the will and fully execute the trusts in accordance with the terms. The other parts of the will, other than item 6, *supra,* in our opinion, can be substantially defined. We are of the opinion that the trust created is "active." The principle laid down in *Cole v. Bank,* 186 N. C., 514, is applicable. Emmett Thomas having died, the income going to him now goes to the granddaughter, Florence Thomas, under the terms of the will. We conclude, from a liberal and common-sense construction of the will, that so much of the entire income, or all of it, as shall be deemed necessary, can be used during the minority of the plaintiff, Florence Thomas, for her maintenance, clothing and education. The testatrix was solicitous and made special provision for the education of her granddaughter, Florence Thomas, but since her father is dead and she has no one to support her, it could hardly be imagined that the trustee could give her the education desired by her grandmother without first providing food and raiment. In fact, especial provision is made to spend the *corpus* of the fund in case of serious or permanent affliction or in case of necessity for the education and accomplishment of Florence Thomas, but this could not be done without inquiry into the matter by the court. Discretion and judgment by inference is given the trustee to spend the income.

From a careful review of the entire will, we are of the opinion that the entire income of the estate can be used in the sound judgment and discretion of the administrator and trustee for food, raiment, education and accomplishment of Florence Thomas until she becomes 21 years of age, and the income to be turned over to her after she becomes 21 years of age, according to the clear language of the will, in periods annually or semiannually, or at such times as the trustee shall deem best within each year. *Wells v. Williams, ante,* 139.

As to the "Baber house," Emmett Thomas having died, the defendant administrator, with the will annexed, and trustee, has the right to sell it and make title in fee simple and invest the proceeds in accordance with the will.

It is well said by defendants in their brief: "The question presented to the court is whether the will of testatrix as executed by her shall be absolutely nullified by the judgment of the Superior Court appealed from. The testatrix, appellant, submits evidences, in her will, a judgment and discretion not usually shown where parents give their property absolutely to their children or other relatives, who, too often, in a short while have nothing left of it to help them through life in the days to come when they need it most. In many instances the use of the property,

by the enjoyment of a certain income from it for the span of two lives or two generations, as in this case, is a far greater blessing than the power of disposition which title confers—and who but a wise mother, who has the courage of her convictions, can best determine the wisdom of her action in that connection when providing for her loved ones?"

The express provisions of a will creating an "active trust," which is not contrary to law, ought to be upheld. The parents know better than any one else the needs and weaknesses of their family and loved ones, and the courts should carry out the solemn and express trust.

We have been much aided by the able briefs of counsel.

The judgment rendered by the court below is modified in accordance with this opinion. The cost is to be paid out of the estate.

Modified and affirmed.

JOHN SCOTT LINEBERRY, BY HIS NEXT FRIEND, W. L. LINEBERRY, v. THE NORTH CAROLINA RAILWAY COMPANY.

(Filed 21 May, 1924.)

1. Negligence—Intervening Cause—Proximate Cause—Railroads—Municipal Corporations—Cities and Towns—Ordinances.

While it may be negligence *per se* for the speed of a railroad train to exceed in a city or incorporated town the speed required by an ordinance, the company is not liable in damages for the killing of a 9-year-old child at play at a permitted crossing, whose death is caused by his being unexpectedly pushed into the train by his companion and playmate as it was passing, the act of the child's companion being the independent, intervening and sole and proximate cause of the death.

2. Same—Evidence—Questions of Law.

Where, upon the trial of an action, only one inference can reasonably be drawn from the evidence, no issue of fact arises for the jury to determine, and the question is one of law for the court.

APPEAL by plaintiff from *Finley, J.*, at December Special Term, 1923, of ALAMANCE.

Civil action. The plaintiff, John Scott Lineberry, is a minor, and W. L. Lineberry has been duly appointed his next of friend, and the defendant is a corporation, organized and existing under the laws of North Carolina. Its roadbed, equipment, etc., is leased to the Southern Railway Company, which is operating same, under the lease, as a common carrier of passengers and freight.

The plaintiff alleges:

"1. That on 13 April, 1921, the defendant, among other trains, was operating and running a fast freight train through the town of

Mebane, N. C., a thickly populated town; that in said town there is a double track, extending some distance east and about three blocks west of the passenger and freight station of the defendant; that from about one-half mile west of the said station to the said station, and beyond, there is a downward and steep grade; that about two and one-half blocks west of said station there is a deep cut, in which is located two parallel tracks of the defendant, with an embankment on either side of said tracks about 8 feet in height; that at this point there is a well-worn footpath, crossing said tracks, which is and has been used for more than a year by the school children of said town who live on the north side of said track in going and returning from school, and by pedestrians generally; that the plaintiff, at the time of the injury hereinafter alleged, lived on the north side of said railroad, and the public-school building of the town was located on the south side of said railroad, about two blocks therefrom; that at the time of the said injury the plaintiff was attending said school and was in the habit of crossing, with other children, the railroad at this point; that there were dirt steps to the said embankment, which were very steep on both side of said railroad, and that the plaintiff and his schoolmates were in the habit of stopping in this cut and running down or sliding down said embankment and playing there; that local freight trains usually stopped at said freight station, and, when so stopped, the rear end of said local train was frequently extended to or near this point, where the said children, at their play, frequently boarded or attempted to board the local freight trains and ride down to the said station.

"2. That on 13 April, 1921, in the afternoon, about 3 o'clock, the plaintiff and his schoolmates, of tender years, and all about the age of plaintiff, were returning from school and stopped in this cut, and there were engaged, as usual, in playing and watching the trains, when a fast train came along, running at the rate of 25 miles an hour, and before plaintiff could realize his danger he was struck by the said fast train and drawn by suction or some other force of said train under one of the wheels of said train, and had his left foot cut entirely off below the ankle, and his left leg above the ankle horribly crushed, mangled and mutilated and so injured that it was necessary to hurry him to a hospital at Burlington, N. C., about eight miles distant, where his left leg was amputated about four inches above the knee, in consequence of said injury, and where he was compelled to remain for.....weeks, and by reason of said injury the plaintiff was caused to suffer the most intense pain, in body and in mind, and was permanently injured thereby, and still suffers therefrom.

"3. That the defendant knew or, by the exercise of reasonable care, should have known that this footpath or crossing was almost daily used

by little children of immature years, and further knew or should have known that the children were attracted to this place and were frequently playing there, and that the defendant had knowledge of the fact that these children were frequently tempted to board and did board and play on its local freight trains; that the defendant knew or should have known that this plaintiff and his playmates who gathered there and played and crossed there were of such tender years that they could not appreciate and comprehend the danger to which they were subjected by the dangerous conditions at this point.

"4. That the defendant owed to the plaintiff the duty of removing or remedying the dangerous conditions at said foot-crossing, and, with its knowledge thereof, a further duty of keeping a proper lookout while approaching said crossing, in anticipation of the obvious and known dangers existing there, and also the duty of observing the ordinance of said town regulating the speed of its trains, and that in breach and by reason of the breach of these duties the plaintiff, without fault on his part, was injured in the way and manner aforesaid.

"5. That the defendant was negligent, in that it failed to remove or remedy the conditions which it knew or should have known by the exercise of reasonable care had been created, allowed and permitted to exist at this dangerous crossing, and the dangers to which this plaintiff was subjected at this place; and in that the defendant was operating and running the said fast train on said occasion at a reckless, dangerous and unlawful rate of speed, in violation of section L, chapter 5 of the ordinances of the town of Mebane, which provides that 'It shall be unlawful for any person, persons or corporation to run any train or trains within the corporate limits of the town of Mebane at a greater rate of speed than fifteen miles an hour in said town'; and in that it failed, in running at this rate of speed, to keep a proper lookout for the danger or dangers which it knew or, by exercise of reasonable care, should have known and anticipated at said point; and in that the defendant was violating its common duty not to run its trains at an excessive, dangerous and unnecessary speed and manner, under the circumstances of this case, while approaching and crossing this well-known and well-worn footway across this track in said town, within the corporate limits of which the said injury was inflicted.

"6. That the negligence of the defendant's lessee, as aforesaid, was the proximate cause of the said injury to the plaintiff, who is now of the age of less than nine years and deprived of one leg and injured for life.

"7. That by reason of said injury by the negligence of the defendant's lessee, as aforesaid, the plaintiff has been endamaged in the sum of $25,000."

The defendant denies the material allegations of the complaint, and for a further defense avers:

"That on the date mentioned in the complaint it was operating a freight train, and that the same was running through the town of Mebane at a rate of speed not in excess of eight miles per hour; that after the engine of said freight train had passed the point at which plaintiff was injured, at which point there was no footpath or crossing of any kind going across the tracks of the defendant, and, while said freight train was still in motion, the plaintiff, without giving any sign of his intention so to do, suddenly ran to said train and tried to swing upon a moving box car, and that while so doing, and before defendant could possibly, in any way, prevent said act or stop said train, the plaintiff fell and was injured by having his leg crushed; that the defendant was guilty of no negligence in any way; that in no way it was the cause of or brought about the injury to plaintiff."

The defendant, for a further defense, and as a plea of contributory negligence, alleges: "That on the date mentioned in the complaint, while the defendant was operating a freight train and was running the same through the town of Mebane at a rate of speed not in excess of eight miles per hour, and after the engine of said freight train had passed the point where plaintiff was injured, there being at said point no crossing of any kind, or footpath usually used as a crossing, there plaintiff carelessly and negligently, and without giving any sign of warning of his intention so to do, attempted to swing upon a moving box car of the train operated by defendant, and in so doing fell and was injured; that the careless and negligent acts of the plaintiff were the approximate cause of the injury sustained by plaintiff, and defendant pleads such negligent acts on the part of the plaintiff as acts constituting contributory negligence and as a bar to any right of plaintiff to recover."

Thomas C. Carter and Koontz & Wharton for plaintiff.
J. Dolph Long for defendant.

CLARKSON, J. The court below, upon motion of defendant, rendered judgment of nonsuit against the plaintiff, and the plaintiff excepted, assigned error, and appealed to this Court.

The evidence of plaintiff, John Scott Lineberry, was as follows:

"My father's name is W. L. Lineberry. Little folks go to the Bad Man if they don't tell the truth. I am 11 years old now, and was about 9 years old when my leg got injured. That has been about two years ago, and happened on a day about half-past 3 o'clock, while I was on my way home from school. I was near the railroad. Clay Qualls pushed me into the train. I was crossing the railroad at the hosiery

mill. I had crossed it there before. The hill is steep there—I mean, it is steep to go up from the railroad. There were two other boys with me that evening—Mr. Moore's boy and Mr. Qualls' boy—one of them about my size. There was a train coming while I was standing there at the track, about 5 feet from the track. The train passed. I saw the engine. It was a freight train. We were not playing in the cut. I was sliding down the bank the other evening, but not that evening. I got hurt when he pushed me into the train and cut my leg off. I do not know how long. I have been going to school something like three years before that. I had not been going across the railroad at this place very long. I live across the railroad, up there on the north side of the railroad. Do not know how long I have been living here. I did not go to school every day that way. The school was on the south, and I lived on the north side."

On cross-examination, he said: "The schoolhouse is on the street that goes by the Mebane Bedding Company. This street goes across the railroad track and is an open street across there. Clay Qualls and Floyd Moore were with me. I do not know that we three boys were the same age. We played together. We started up the street that goes by the Durham Hosiery Mills. The engine had done passed when we got to the Durham Hosiery Mill, and the train was going down the track. That was before I got to the cut. We went by the Durham Hosiery Mills. There is a street in front of the mill, along the railroad track, that goes the same way the railroad track goes. We crossed that street and then went down the side of the embankment where the train was going. Clay Qualls went with me, and Floyd Moore stopped at the hosiery mill. After we got there and saw the train going by, we went on down into the cut, where the train was. I did not go near the train; I went about 5 feet from the bank down there. After we went down the bank, we had to cross the sidetrack before we got to the main track, and the train was on the main track. We crossed the sidetrack and went near where the train was going, on the main line. We went within about 2 feet of the train. *Then Clay Qualls pushed me under the train, and my foot was cut off.* The caboose passed pretty quick after I got hurt; the rear end was not far from me when I was pushed. It was a long train. In going to school we frequently went across at the Mebane Bedding Company crossing. I have seen other children crossing there."

Shelley Hoskins testified, in part: "I work at the brickyard. In April, 1921, I worked for Mr. J. W. Nicholson, at Mebane. On the afternoon of the 13th of April, when this boy was injured, I had been out to Mr. Nicholson's farm to get some hay, and at the time this accident occurred I was right there at the railroad crossing, on the south side. I was sitting on top of a load of hay. I could see the railroad

track. I was standing right opposite the track. My team was headed towards the station. The train was going towards the station—going east. I saw this little boy at the time the locomotive of the train passed the point where the pathway that has been described crossed the railroad. This little boy and two or three more little boys came right up to the cut. They got there just about the time the engine got there, and I think him and another one or two started down the bank, and *I seen one little boy give him a shove, and just as they give him a shove he ran across the sidetrack and slipped, some way, and I seen him fall under the train.* . . . After the engine passed, I saw two or three boys go down the embankment. Yes, the engine just had gone by. The train was on the main line. The pass-track was between the embankment, where these children went down the main track. They had to pass over the pass-track before they got to the train. *About the time he got on the pass-track he gave him a push and he kind of fell over. At that time, I reckon, the train was about half by.*"

E. T. Carr testified, in part: "All classes, both children and adults, use the pathway—mostly children, I would say—children going to school. The school is about three city blocks. I have seen children playing up and down the banks."

J. P. Cates testified, in part: "I cannot say for certain how long this particular path has been across the railroad at that place—ever since I have been in Mebane—about ten years. People use this path every day. Yes, it is used by children going and coming from school. I have seen children playing around and running across and running down one bank and up the other across the track. I have seen children there when the trains were there."

The evidence, succinctly taken, in a light most favorable to plaintiff, on the motion of nonsuit, was that the plaintiff, John Scott Lineberry, was returning from school about 3:30 o'clock in the evening, and was seriously injured by the defendant's train on the main line, cutting his leg off. Children going to school used the pathway and played up and down the banks. The freight train was running through the town of Mebane about twenty-five miles an hour. The town ordinance did not permit a greater rate of speed than fifteen miles an hour. Lineberry was about 9 years old and had been going to school about three years. The boys were in the habit of going along the railroad to school through the cut. The day of the injury Lineberry was not playing in the cut at the place he was injured. He had not been going across the railroad very long. He lived on the north side of the railroad, and the school was on the south side. At the time of the injury the train had passed him and was going down the track. He and Clay Qualls went down the side of the embankment where the train was going, and went down into

the cut where the train was. He did not go near the train, but went about 5 feet from the bank; before he could get to the main track, that the train was on, he had to cross a sidetrack.

The young lad said: *"We crossed the sidetrack and went near where the train was going, on the main line. We went within about two feet of the train. Then Clay Qualls pushed me under the train, and my foot was cut off."*

Shelley Hoskins testified: "I think him and another one or two started down the bank, and *I seen one little boy give him a shove, and just as they give him a shove he ran across the sidetrack and slipped, some way, and I seen him fall under the train.* . . . About the time he got on the pass-track *he gave him a push and he kind of fell over. At that time, I reckon, the train was about half by."*

Plaintiff contends that children played up and down the bank of the cut, and used the path across the railroad, going and coming from school; that children ran down one bank, across the track, and up the other bank; that the place where young Lineberry was injured was an "attractive nuisance"; that it is a childish propensity to slide down steep banks, and that this was the habit of children in this cut, and the defendant's engineer in charge of the freight train saw or could have seen these children, and could have anticipated, by the exercise of due care, that children were in the habit of congregating at this place; that defendant was negligent in running its freight train at twenty-five miles an hour through this cut and the town, contrary to the ordinance of the town; that defendant failed to keep a proper lookout; that, under the facts and circumstances of this case, defendant was negligent; that Lineberry was not a trespasser, but had an implied license to be in the cut and go across the track on a well-known way that had been used by implied consent of defendant, and, on account of his being only 9 years of age, was not guilty of contributory negligence, and that the court below erred in granting a nonsuit.

These contentions cannot prevail, under the facts and circumstances in this particular case. There was a superseding or responsible cause—intervening cause. The evidence of both young Lineberry and his witness, Hoskins, that his companion, Qualls, pushed him under the train. Lineberry said: *"We went within two feet of the train; then Clay Qualls pushed me under the train, and my foot was cut off."* Hoskins said: *"About the time he got on the pass-track he gave him a push and he kind of fell over. At that time, I reckon, the train was about half by."*

Admitting that defendant's train was running through the town of Mebane at the speed of twenty-five miles an hour, in violation of the town ordinance, and it was on that account guilty of negligence *per se,*

was this negligence the proximate cause of the injury? We think not. The actual cause was Qualls' pushing Lineberry under the train. There was no causal connection between the train's speed and the inexcusable conduct of Qualls.

It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not. In the instant case the facts are all admitted, and the independent cause intervening—Qualls' pushing Lineberry under the train—was the sole proximate cause of the injury.

Shearman & Redfield on the Law of Negligence (6 ed.), Vol. 1, sec. 32, states clearly the vice of plaintiff's contention: "The connection between the defendant's negligence and the plaintiff's injury may be broken by an intervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one if it is the culpable act of a human being who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury, when the connection is thus actually broken by a responsible intervening cause. But the connection is not actually broken if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable and the defendant's negligence is an essential link in the chain of causation."

"If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, they are not sufficiently conjoined, or concatenated as cause and effect, to support an action. If the damages would not have followed the wrong if other independent circumstances had not intervened, for which the defendant is not responsible, the damage cannot be said to be the proximate result of the wrong, or so connected therewith as to uphold a recovery therefor. But a wrongdoer is responsible for all the consequences that ensue in the ordinary and natural course of events, although those events are brought about by the intervening agency of others, provided the intervening agency was set in motion by the primary wrongdoer, or the acts causing the damage were the necessary or legal and natural consequences of the original wrongful act." Wood on Railroads, Vol. 2, p. 1438.

As an illustration of the many cases on this subject, the case of *Carter v. Towne,* 98 Mass., 567, and 103 Mass., p. 507, is an interesting one: "Defendant sold gunpowder to a child, but the child gave the

powder to its parents, who afterwards allowed the child to take some of it, by the accidental explosion of which he was injured. In an action against defendant it was held that he was not liable, even admitting his negligence, since the act of the parents in negligently allowing the child to have the powder was such an intervening efficient cause as to break the causal connection between defendant's wrongful act and the ultimate injury."

The interesting discussion in plaintiff's and defendant's briefs, in regard to "attractive nuisances," the *"Turntable case,"* and the liability and nonliability in reference to children, we do not think, is raised by the facts on the record in this case. This is a case where the railroad was guilty of violating the speed limit in the town limits of Mebane, and guilty of a misdemeanor and subject to a fine. This violation of a town ordinance made the defendant guilty of negligence *per se,* but that negligence must be the proximate cause of the injury to young Lineberry. In the present case the testimony of the young lad, Lineberry, was that his companion, another young lad who was with him, pushed him under the moving train. This was the intervening, independent, sole proximate cause of the injury, for which the defendant cannot be held liable. The injury was not the natural or probable consequence of defendant's negligence in exceeding the speed limit. Pushing the boy under the train was the proximate cause of the injury. It was an unfortunate and deplorable tragedy, but defendant is in no way responsible for the act of the Qualls boy.

We think the nonsuit was properly granted by the court below.

Affirmed.

BOARD OF COMMISSIONERS OF EDGECOMBE COUNTY
v. PRUDDEN & COMPANY, INC.

(Filed 31 May, 1924.)

Schools—Bonds—Taxation—In What Name Bonds to be Issued—Statutes.

Chapter 136, Public Laws 1923, was passed to make a uniformity of issue of bonds by school districts for the acquisition and maintenance of its buildings, etc., for school purposes, and, to effectuate its purpose, prescribed that the bonds so issued shall be in the name of the county, payable exclusively out of the taxes to be levied in the districts solely benefited; repealing in this respect the provisions of the statute of 1921; and such bonds issued contrary thereto are void.

APPEAL by plaintiff from *Bond, J.,* at April Term, 1924, of EDGECOMBE, on a case agreed.

On 2 July, 1923, the Board of Education of Edgecombe County petitioned the board of county commissioners to call a special election in the Leggetts Consolidated School District, said county, to ascertain the will of the voters therein as to whether or not bonds of said district should be issued in an amount not to exceed $30,000, and as to the levying of a sufficient tax for the payment thereof, for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings and purchasing sites in such district, or for any one or more of said purposes; said petition being made in accordance with section 257, chapter 136, Public Laws 1923.

The election was held on 21 August, 1923, and was carried, and on 20 December the bonds were sold to the defendant at the contract price of $31,576 and the interest accrued to the date of delivery.

All proceedings up to and including the sale of said bonds were due and regular and in accordance with article 22, chapter 136, Public Laws 1923, and said bonds are within every limit of debt prescribed by law.

Said bonds, in the form hereto attached and made a part of the case agreed, dated 1 January, 1924, in the aggregate sum of $30,000, in denomination of $1,000 each, bearing interest at the rate of 6 per cent per annum, payable semiannually on the first day of July and January after issue, and in accordance with interest coupons thereto attached, being serial bonds, and becoming due and payable as follows: one each year, beginning 1 January, 1927, to 1952, inclusive, and two each year, beginning 1953, to 1954, inclusive, were duly issued.

Said bonds, so issued and signed by the chairman of the board of county commissioners, with the seal of the county impressed on each bond, and attested by the clerk of said board, were duly tendered to said defendant, in accordance with the contract of sale, and payment therefor demanded, and said defendant refused to accept said bonds and pay the contract price therefor.

The defendant refused to accept said bonds and make payment therefor, for that the same are not valid obligations of the Leggetts Consolidated School District, for that, first, the statute (section 258, Public Laws 1923, ch. 136), under which said bonds are issued, is ambiguous, vague, uncertain and, for these reasons, void; and, second, if said section be valid, the said bonds as tendered are not in form as authorized by said section.

It is agreed that if the court shall be of opinion with the plaintiff, judgment shall be entered requiring the defendant specifically to perform its said contract; but if the court be of the opinion with the defendant, the necessary judgment shall be entered dismissing the action.

The form of the bond is as follows:

STATE OF NORTH CAROLINA

COUNTY OF EDGECOMBE

Leggetts Consolidated School District School Bond

No..... $1,000.00

For value received, the Leggetts Consolidated School District of Edgecombe County, North Carolina, hereby promises to pay to the bearer the sum of one thousand dollars on the first day of January, 19....., with interest meanwhile at the rate of six per cent per annum, payable semiannually to the bearer of the coupons therefor, hereto annexed, upon presentation and surrender thereof as they severally mature, both principal and interest being payable at the Hanover National Bank, New York, N. Y.

This bond is issued by virtue and in pursuance of article 22, chapter 136, of the Public Laws of North Carolina, Session 1923, and it is hereby certified that every requirement of law relating to the issue hereof has been duly complied with, and that this bond is within every debt and other limit prescribed by the Constitution or laws of North Carolina.

In witness whereof, the Board of Commissioners of Edgecombe County, acting for and in behalf of the Leggetts Consolidated School District, have caused the seal of the county to be hereto affixed, and this bond to be signed by its chairman and clerk, and the annexed interest coupons to bear the *facsimile* signature of the said chairman, and this bond to be dated 1 January, 1924.

J. V. COBB,
Chairman of the Board of County Commissioners of Edgecombe County.

M. B. BUNN,
Clerk of the Board of County Commissioners of Edgecombe County.

INTEREST COUPON

No..... $30.00

The Leggetts Consolidated School District, Edgecombe County, North Carolina, will pay the bearer on the first day of July (January), 19....., thirty dollars, at the Hanover National Bank, New York, N. Y., for six months interest then due on its school bond dated 1 January, 1924.

No.....

J. V. COBB,
Chairman of the Board of County Commissioners of Edgecombe County.

Upon the facts agreed, his Honor dismissed the action, and the plaintiff appealed.

Henry C. Bourne for plaintiff.
Lyn Bond for defendant.

ADAMS, J. The defendant submits two propositions—first, that the form of the bonds is not such as the statute requires; and, second, that the provision in regard to the issuance and payment of the bonds is indefinite, uncertain, and void. If the first proposition is sound, the second need not be considered.

Prior to the adoption of the act codifying the laws relating to public schools, the trustees of a school district were authorized to issue the bonds of such district in its corporate name. Public Laws 1919, chs. 143, 308; Public Laws, Extra Session 1920, ch. 87, secs. 1, 2; *School Com. v. Board of Education,* 186 N. C., 643, 648. At the session of 1921 the Legislature provided that bonds thereafter issued by or on behalf of a school district should be issued either in the name of such corporation or in the name of any incorporated official board or body authorized to issue such bonds, or in such other manner as should be authorized by law. Public Laws 1921, ch. 133, sec. 4.

It was probably with a view to securing uniformity in all bonds issued pursuant to an election held in a county, special-taxing district, or local-taxing district, for the purpose of acquiring, erecting, enlarging, altering, and equipping school buildings and purchasing sites, that the General Assembly, at the session of 1923, passed an act prescribing in what manner such bonds should be issued, and repealing all laws in conflict with it. Public Laws 1923, ch. 136. This conclusion may be deduced from the obvious purport of the various statutes. Section 257 provides that whenever the county board of education shall so petition, the board of county commissioners shall order a special election to be held for the purpose of voting upon the question of issuing bonds; and section 258, "If a majority of the qualified voters of said county or district shall vote in favor of the issuance of such bonds and the levy of said tax, then the board of county commissioners shall have power to issue the said bonds, which shall be issued in the name of the county; but unless the election was held in the entire county, they shall be made payable exclusively out of taxes to be levied in the district."

In the instant case the bonds have been issued in the name of "Leggetts Consolidated School District of Edgecombe County." The school district, not the county, has promised to make payment to the bearer. The bonds, therefore, have not been issued in conformity with the statute, and the defect is not cured by affixing to the bonds the signature of

the chairman and the clerk of the board of county commissioners. The bonds, as pointed out in the statute, should be issued in the name of the county, and should show upon their face that they are payable exclusively out of taxes to be levied in the district. The defect is fatal, and the action was properly dismissed. *Comrs. v. Call,* 123 N. C., 308, 319; *Comrs. v. Payne,* 123 N. C., 432, 490; *Comrs. v. De Rosset,* 129 N. C., 275, 280; 9 C. J., 24; 35 Cyc., 993. The judgment is

Affirmed.

FRED ALLEN v. JOE GARIBALDI.

(Filed 31 May, 1924.)

1. Evidence—Trials—Nonsuit—Questions for Jury—Statutes.

Upon motion of defendant to nonsuit, considering the evidence in the light most favorable to the plaintiff (C. S., 567): *Held,* the evidence in this case was sufficient for the jury to find the issue of actionable negligence for the plaintiff, and to deny the motion. *Wallace v. Squires,* 186 N. C., 339.

2. Evidence—Appeal and Error—Objections and Exceptions—Motions—Mistrials—Venire de Novo.

Where the defendant's exception to the admissibility of evidence is sustained, he may not successfully contend on appeal that the suggestion in the question prejudiced him with the jury, though it was unanswered by the witness, his remedy being by motion for a mistrial, or *venire de novo* in the Superior Court.

APPEAL by defendant from *Harding, J.,* at November Term, 1923, of MECKLENBURG.

Civil action, to recover damages for an alleged negligent injury.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant's minor son, as alleged in the complaint? A. Yes.

"2. Was Lynn Garibaldi the agent and servant of the defendant, Joe Garibaldi, at the time of said injury, as alleged in the complaint? A. Yes.

"3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? A. No.

"4. If so, could the defendant's son, by the exercise of ordinary care, have avoided the injury to plaintiff, notwithstanding the negligence of the plaintiff? A. Yes.

"5. What damages, if any, is the plaintiff entitled to recover of the defendant? A. $5,000."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

Parker, Stewart, McRae & Bobbitt for plaintiff.
Tillett & Guthrie for defendant.

STACY, J. Plaintiff was injured on the night of 2 July, 1922, about 9 p. m., near the center of South Boulevard Street, in the residential section of the city of Charlotte, and this action is brought to recover damages therefor. He was working for the local traction company, and had gone out to repair some electric wires which had been damaged by a storm. While crossing the street, plaintiff dropped a transformer plug (a metal object, about 6 inches long) and was engaged in looking for it, leaning over in a stooped position, when he was struck by defendant's automobile, which was being driven at the time by Lynn Garibaldi, defendant's minor son. It was alleged that the automobile was not equipped with proper lights and was being driven at an unlawful rate of speed; that the driver failed to give any warning of his approach, and neglected to keep a proper lookout for persons or pedestrians on the street, and that he failed to stop his automobile or swerve it to the side so as to avoid striking the plaintiff, which he could and should have done in the exercise of due care.

The exception upon which the defendant has placed much emphasis is the one directed to the refusal of the court to grant his motion for judgment as of nonsuit, made first at the close of plaintiff's evidence, and renewed at the close of all the evidence. C. S., 567. Without stating the facts in detail, some of which are in dispute, we are convinced, from a careful perusal of the record, viewing the evidence in its most favorable light for the plaintiff, the accepted position on demurrer or motion to nonsuit, that the case was properly submitted to the jury, and that the verdict, as rendered, is amply supported by the testimony of plaintiff's witnesses. In fact, it is frankly conceded by the defendant that the decision in *Wallace v. Squires,* 186 N. C., 339, must be overruled if his motion for judgment as of nonsuit is sustained in the present case. Without deciding whether we shall follow all that was said in that case, it is sufficient for present purposes to state that the "family-purpose" doctrine, with respect to automobiles, has been adopted as the law of this jurisdiction in several recent decisions. *Robertson v. Aldridge,* 185 N. C., 292; *Tyree v. Tudor,* 183 N. C., 340 (modified in another respect in *Williams v. R. R., ante,* p. 354); *Clark v. Sweaney,* 176 N. C., 529; *S. c.,* 175 N. C., 280; *Williams v. May,* 173 N. C., 78; *Taylor v. Stewart,* 172 N. C., 203. For an extended discussion of this doctrine, see 33 Yale Law Journal, 780, and note to *Arkin v. Page,* 287 Ill., 420, as reported in 5 A. L. R., 216.

The next exceptions, earnestly pressed by defendant, are those addressed to the following questions asked Lynn Garibaldi and his father, Joe Garibaldi, when they, as witnesses, were being cross-examined by plaintiff's counsel:

"Q. I will ask you (Lynn Garibaldi) if you don't know that your father notified the indemnity company of this injury?" Objection by defendant sustained.

"Q. Mr. Joe Garibaldi, after this accident occurred and before any suit was brought in this case, did you write a letter to the United States Casualty Company notifying that company of this accident?" Objection by defendant sustained.

It is the position of the defendant that the asking of these questions, though not allowed to be answered in the presence of the jury, was highly prejudicial to a fair and impartial trial, because they carried with them the suggestion that the defendant was insured in a casualty company and that whatever damages might be awarded would be paid by another, a stranger, and not by the defendant. On account of the propounding of these interrogatories, defendant insists that a new trial should be awarded, and cites the following cases as supporting, either directly or in tendency, his position in this regard: *Star v. Oil Co.,* 165 N. C., 587; *Lytton v. Mfg. Co.,* 157 N. C., 333; *Conover v. Bloom,* 112 Atl. (Pa.), 753; *Aiken v. Lee,* 206 N. Y., 20, and *Edwards v. Earnest,* 89 So. (Ala.), 729, where the question is discussed at considerable length.

The plaintiff, on the other hand, contends that the above questions were not only proper, but that the court erred to his prejudice in not allowing them to be answered. He says they were competent as tending to show a recognition on the part of the defendant, which was denied by him, of the relation of principal and agent existing between himself and his son at the time of the injury. In support of this position he cites the following authorities: *Robinson v. Hill,* 60 Wash., 615; 111 Pac., 871; *Baten v. Ice Co.,* 180 Mo. App., 96; 166 S. W., 883; *Oil Co. v. Carson,* 185 S. W. (Tex.), 1002; *Lbr. Co. v. Cunningham,* 57 So. (Miss.), 916.

Without deciding upon the merits of these opposing contentions, we think the defendant's motion for a new trial, after verdict, upon the ground stated, must be overruled. The court sustained the defendant's objection, and this was all that he was asked to do at the time. There was no motion for a mistrial, or *venire de novo,* because of these alleged improper questions. Defendant elected to proceed with the trial and to take his chances with the jury as then impaneled. Indeed, it appears that counsel for both sides, during the argument, cautioned the jury to disregard the suggestion of liability insurance, as there was no evidence

in the case tending to show its existence. Evidently the defendant did not consider it of sufficient importance on the trial to ask that a juror be withdrawn and a mistrial entered.

The remaining exceptions and assignments of error present no new or novel point of law not heretofore settled by our decisions, and it would only be a work of supererogation to consider them *seriatim*.

After a full and careful consideration of the whole record, we have found no reversible or prejudicial error, and this will be certified to the Superior Court.

No error.

ALEX SMITH v. TOWN OF MORGANTON.

(Filed 31 May, 1924.)

Waters—Riparian Owners—Diversion of Flow—Lower Proprietor—Damages—Easements—Municipal Corporations—Cities and Towns.

A riparian owner is entitled to the natural flow of a stream of water running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by a reasonable use of the water by other like proprietors, as a right, not as an easement, inseparably annexed to the soil; and *held*, a city or town that causes damage to the lower proprietor by damming the stream and diverting the use of the waters for the use in connection with its sewer system and for its inhabitants, is liable in damages, though the lower proprietor may not, at the time, be using the stream for any purpose.

APPEAL by defendant from *Long, J.*, at January Special Term, 1924, of BURKE.

The suit was brought against the town of Morganton and Boyd, Higgins & Goforth, Inc., for the recovery of damages for the diversion of water. The plaintiff alleged that he was the owner of two tracts of land in Burke County through which the regular volume of a water course known as Henry River formerly flowed, and that the defendants had unlawfully and wrongfully constructed a permanent dam across the river a mile above the lands of the plaintiff, had unlawfully diverted the water from his land by means of underground pipes, and had wrongfully obstructed the flow thereof to his damage.

The defendants filed an answer admitting that they had constructed a concrete dam across the river in an inaccessible and sparsely inhabited portion of the county, and that through pipes a portion of the impounded water was conveyed into Morganton and there delivered to the inhabitants of the town for public and private use. They alleged that the town constructed a system of waterworks as a public necessity by

virtue of Private Laws 1913, ch. 104; Private Laws 1917, ch. 108; Private Laws 1921, Ex. Sess., ch. 91, and the amendments thereto; that the quantity of water taken from the river was inconsequential, and that they had incurred no liability to the plaintiff.

Before the introduction of evidence, the plaintiff took a voluntary nonsuit as to Boyd, Higgins & Goforth, Inc., and prosecuted the suit against the town of Morganton.

The following verdict was returned:

1. Is the plaintiff, Alex Smith, seized and possessed of the lands described in the complaint? A. Yes, except that portion of the three-acre tract embraced in a deed made by plaintiff to L. A. Chapman, as per said deed on public registry, Book B-5, p. 39.

2. Did the defendant, Town of Morganton, unlawfully and unreasonably and permanently divert the water of Henry River from the lands of the plaintiff, Alex Smith, as alleged in the complaint? A. Yes.

3. If so, what permanent damages, if any, is the plaintiff, Alex Smith, entitled to recover of the defendant? A. $100.

Judgment for the plaintiff. Appeal by defendant.

S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
W. A. Self and L. E. Rudisill for defendant.

ADAMS, J. The plaintiff contends that he is a lower proprietor from whose land the natural flow of the water in Henry River has been unreasonably diverted by the defendant; that by reason of such diversion the value of his land has been diminished, and that he is entitled to the recovery of damages. His contention therefore involves the question of a riparian owner's rights in a stream of water flowing through or adjacent to his land. Such rights are governed by principles which have been settled and frequently applied.

Farnham says that a comprehensive statement of the rights of a riparian owner is that he has a right to have the stream remain in place and to flow as nature directs, and to make such use of the flowing water as he can make without materially interfering with the equal rights of the owners above and below him on the stream. Furthermore, the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. Waters and Water Rights, secs. 461, 462. This doctrine finds support in our decisions

which hold that a riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors. *Pugh v. Wheeler,* 19 N. C., 50; *S. v. Glen,* 52 N. C., 321; *Walton v. Mills,* 86 N. C., 280; *McLaughlin v. Mfg. Co.,* 103 N. C., 100; *Adams v. R. R.,* 110 N. C., 326; *Durham v. Cotton Mills,* 141 N. C., 615; *Harris v. R. R.,* 153 N. C., 542.

The defendant says "the shoal and waterfalls" have no intrinsic commercial value, and as the plaintiff has never made practical use of the stream, his action is based on an unappropriated right of user which should not be treated as a property right, but this position is not in accord with the authorities. Riparian rights are inseparably annexed to the soil and pass with it as a part and parcel of it and not as an easement or appurtenant. They are not dependent upon the owner's actual use or appropriation of the flowing water. *Waterworks Co. v. Cline,* 33 L. R. A., 376; *Ulbricht v. Water Co.,* 4 L. R. A., 572; *Railway Co. v. Bancroft,* 38 L. R. A. (N. S.), 526.

After considering the exceptions to the admission of evidence we find no sufficient reason for sustaining them. The questions involved have been discussed in several decisions and decided adversely to the defendant's contention. The remaining exceptions were formal.

No error.

STATE v. P. M. HEDDEN.

(Filed 31 May, 1924.)

Abandonment—Husband and Wife—Criminal Law—Limitation of Actions— Statutes—Appeal and Error—Instructions.

For the conviction of a misdemeanor prescribed for the abandonment by the husband of his wife and children (C. S., 4173, 4448, 4449), it is required by C. S., 4512, that presentment shall be made or found by the grand jury within two years after the commission of the offense, and a conviction of the husband otherwise cannot be sustained; and an instruction of the trial judge extending the time for a period caused by delays in the investigation in the court of the justice of the peace, should the warrant have been issued in the time prescribed by the statute, is reversible error, such being insufficient to repel the bar of the statute.

APPEAL by defendant from *Bryson, J.,* at November Term, 1923, of MACON.

Criminal action for abandonment. The indictment was found a true bill by grand jury at November Term, 1923.

The evidence on the part of the State tended to show that defendant abandoned his wife and three children without cause on 11 September, 1921, and had since not associated with them or in any way contributed to their support. State's evidence tended to show further that defendant was arrested for alleged offense under a magistrate's warrant on 25 October, 1922, and put in jail, and being thereafter released. The indictment was found, as stated, on 1 November, 1923.

The entries on the criminal docket of the Superior Court showed that Eva Hedden, wife of defendant, and prosecuting witness, was called and failed to appear; judgment *nisi* against her, and cause continued to 21 November, 1922. And on Minute Book, April Term, 1923, in *S. v. P. M. Hedden,* was the entry, "Cause continued." And on Minute Docket at November Term, *S. v. P. M. Hedden,* abandonment, "Alias." Defendant offered no testimony.

After properly defining the offense and stating the requisites to a conviction, the court, in reference to the statute of limitations, instructed the jury as follows:

"Where a warrant is issued, it marks the beginning of a criminal investigation, and where one is charged with an offense and a warrant is issued before a justice of the peace and an investigation before the justice of the peace is continued in its several steps necessary until it reaches the Superior Court, then the date of the institution of the action itself would not be counted as of the date of the finding of the bill of indictment, but of the date of the issuance of the warrant. But if the warrant was issued and discontinued, and was allowed to lapse, and did so, that it did not form the basis of the bill of indictment, then the bill of indictment found, if it was not found upon a presentment, it would indicate by its date the institution of the action."

Verdict, Guilty. Judgment, and defendant excepted and appealed, assigning for error the refusal of the court to allow his motion to nonsuit at the close of the evidence, and the excerpt from the charge on the statute of limitations.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. W. Horn, R. D. Sisk, and George Patton for defendant.

HOKE, J. Under our statutes, C. S., 4173 and 4448 and 4449, the crime of abandonment is made a misdemeanor punishable as at common law with the additional power in case of conviction to make such "other orders as will best provide for the support of the deserted wife and children from the property or labor of the defendant." And under C. S., 4512, it is provided "That all misdemeanors and petit larcenies

where the value of the property does not exceed $5, except the offenses of perjury, forgery, malicious mischief, etc., shall be presented or found by the grand jury within two years after the commission of the same and not afterwards," etc.

There is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards.

In *S. v. Morris,* 104 N. C., 837, it was sought to avoid the effect and operation of the statute by evidence tending to show that the grand jury within the time had been investigating the matter, but the position was disapproved, and in reference to it the court held:

Where a bill for a misdemeanor was sent to a grand jury, which began an investigation, but "continued" the case for want of material witnesses, returning the bill with that endorsement into court without presentment, and it was so entered of record, and at a subsequent term of the court, but more than two years after the commission of the offense, the bill was sent to another grand jury, which found it true: *Held,* not to be a presentment within the time, and that the prosecution was barred.

In the opinion in the *Morris case,* the Court cited *S. v. Tomlinson,* 25 N. C., 32, to the effect that even an indictment within the time will not uphold a trial and conviction on a second bill found after the statutory period.

The State's testimony showing that the prosecution is barred by lapse of time, and there being no fact or facts in evidence permitting a contrary inference, defendant's motion to dismiss the case as on judgment of nonsuit should have been allowed. *S. v. Fulcher,* 184 N. C., 663. This will be certified that the cause be dismissed.

Reversed.

JOHN WHITT v. R. G. RAND AND JOHN WARD, TRADING AS RAND & WARD.

(Filed 31 May, 1924.)

1. Employer and Employee—Master and Servant—Negligence—Simple Tools—Proximate Cause.

In order for the employee to recover of his employer damages for the latter's failure to supply simple tools and appliances for the performance of the work required of him, the plaintiff must show that the defendant

had failed in the discharge of this duty, and that from the failure of the defendant therein some appreciable and substantial injury to the plaintiff may reasonably have been expected to occur, and that the consequent injury was proximately caused by the defendant's default therein.

2. Same—Assumption of Risks—Evidence—Nonsuit—Statutes—Appeal and Error—Trials—Questions for Jury.

In an action to recover damages against his employer for his failure to furnish the plaintiff goggles, or glasses, for the protection of the plaintiff's eyes in chiseling off a portion of a concrete bridge, in pursuance of his employment, there was evidence tending to show that under the existing circumstances the defendant's custom was to furnish them, and at plaintiff's request the defendant's foreman had promised to do so, and, relying thereon, the plaintiff continued at his work for several hours, when a flying particle of the concrete from the plaintiff's chisel caused the injury in suit: *Held*, upon defendant's motion as of nonsuit, the evidence was sufficient to take the case to the jury upon the issue of negligence and assumption of risk.

3. Same—Custom—Instruction.

Where, in an employee's action to recover of his employer damages for the latter's failure in his duty to furnish the former a tool or appliance reasonably necessary for the plaintiff's protection in doing the work required of him, an instruction that makes the defendant's liability solely depend upon his custom to furnish the appliance under the circumstances, without reference to the proximate cause of the injury, under conflicting evidence thereof, is reversible error.

APPEAL by defendants from *Ray, J.*, at March Term, 1924, of MADISON.

Civil action to recover damages for an alleged negligent injury, tried upon the following issues:

"1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff assume the risk of being injured as alleged in the answer? Answer: No.

"3. What damage, if any, is plaintiff entitled to recover? Answer: $2,000."

From a judgment entered on the verdict, defendants appeal, assigning errors.

George M. Pritchard and McKinley Pritchard for plaintiff.
Harkins & Van Winkle for defendants.

STACY, J. There was allegation and evidence tending to show that the plaintiff, an inexperienced workman, was employed by the defendants, who are bridge builders, and put to work by them in chiseling off a portion of a concrete bridge, without providing any spectacles or goggles for the plaintiff as a protection to his eyes from the flying

fragments of stone and concrete, as was ordinarily used and customarily supplied by the employer in such work, especially when done in the country as was the case here. It was further in evidence that the defendants' foreman had promised to furnish the plaintiff a pair of spectacles, similar to the pair he was wearing, after the plaintiff had complained to the foreman of being annoyed by dust and small particles of stone striking and lodging in and about his eyes. In the afternoon of the same day this promise was made, and while plaintiff was working in expectation of receiving the glasses, one of his eyes was punctured by a flying fragment of stone, or concrete, necessitating an operation for its removal and the substitution of an artificial eye. The injury occurred on 28 August, 1922, three or four days after the plaintiff had entered upon his work with the defendants.

We think this evidence, taken in its most favorable light for the plaintiff, the accepted position on demurrer or motion to nonsuit, was sufficient to carry the case to the jury.

"A perusal of our decisions on the subject will show that in order for liability to attach, in case of simple, everyday tools, it must appear, among other things, that the injury has resulted from a lack of such tools or defects therein which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur." *Hoke, J.,* in *Winborne v. Cooperage Co.,* 178 N. C., p. 90.

In *Bilicki v. Shipbuilding Co.,* 147 App. Div. (N. Y.), 687, a case quite similar to the one at bar, recovery was denied upon the ground that the evidence did not show it customary for goggles (with glass fronts and wire sides, or with wire fronts and sides, or with isinglass fronts and wire sides) to be furnished the workmen at the instance of the employer. But here the evidence is to the effect that such was the custom where the work was being done out in the country and away from easy access for the employees to secure such instruments of protection for themselves.

With respect to whether it was customary for the employer, under the circumstances here presented, to furnish goggles or glasses to the workmen, his Honor instructed the jury as follows:

"If you find there was any such custom, then you would answer that first issue 'Yes'; if you answer that there was no custom and the defendant agreed to furnish the glasses, then you would have to inquire as to the time in which to furnish them and take into consideration the work there of the plaintiff until he was injured in the afternoon."

The defendants have made this instruction the basis of one of their exceptions, and we are of opinion that it must be sustained. The bare existence of the custom would not import liability, even if it were being violated at the time, for it is not admitted on the instant record that plaintiff's eye was injured in the manner alleged. It would be necessary for the jury to find, in addition to the existence of the custom, that plaintiff's injury was the proximate result of the nonobservance of such custom on the part of the defendants. The instruction, as given, is defective in this respect.

In order to establish a case of actionable negligence in a suit like the present, the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Ramsbottom v. R. R.*, 138 N. C., 41.

For the error, as indicated, there must be a new trial; and it is so ordered.

New trial.

LETHA ANDERSON v. W. A. NICHOLS.

(Filed 31 May, 1924.)

1. Contracts—Deeds and Conveyances—Parol Evidence.

In an action to recover upon certain mortgage notes given for the purchase of certain lands, on which was a hotel containing certain articles of furniture, and the defendant sets up a counterclaim for damages for the breach by plaintiff of his contract to deliver the furniture: *Held*, the failure of the plaintiff's deed to include the furniture does not exclude defendant's evidence upon his counterclaim, the statute of frauds not requiring contracts in this respect to be in writing, and the parol evidence not being contradictory of the written instrument.

2. Courts—Discretion—Appeal and Error—Objections and Exceptions—Juror's Relationship to Party.

It is within the sound discretion of the trial judge to refuse a motion to set aside a verdict for relationship of a juror to a party litigant, when the general question of relationship had been asked without response, and the trial had been proceeded with without further question or objection.

3. Evidence—Corroboration—Appeal and Error.

Evidence material in corroboration of substantive evidence theretofore admitted on the trial is competent.

ANDERSON *v.* NICHOLS.

APPEAL by plaintiff from *Bryson, J.*, at November Term, 1923, of CHEROKEE.

The verdict was as follows:

1. Is the defendant indebted to the plaintiff by reason of the matters set forth in the complaint, and if so, in what amount? Answer: Yes, $500 with interest thereon from 5 October, 1922.

2. Is the plaintiff indebted to the defendant by reason of the prayer for affirmative relief of the answer? Answer: Yes, $500.

Moody & Moody and J. D. Mallonee for plaintiff.
Thos. J. Hill and Dillard & Hill for defendant.

ADAMS, J. On 5 October, 1921, the defendant purchased certain property from the plaintiff at the price of five thousand five hundred dollars. He paid $4,000 in cash and executed three promissory notes in the sum of $400 each, payable on 5 November, 1922, 1923, and 1924, respectively. The plaintiff brought suit on the note first maturing and alleged that all the notes had been executed as evidence of the remainder due on the purchase of several parcels of land described in a deed she had delivered to the defendant. The defendant alleged that the plaintiff had contracted to sell him at the agreed price not only the land, but a piano, an organ, a stove, and other enumerated articles described as furniture, which were in a hotel situated on one of the lots, and that the plaintiff had taken possession of these articles and in breach of her contract had failed to deliver them. Upon these allegations he set up a counterclaim against the plaintiff for one thousand dollars.

The first issue was answered by consent. As to the second, the plaintiff in effect requested an instruction that the deed executed and delivered by the plaintiff to the defendant, conveying the land but not the furniture, constituted the contract between the parties and that the counterclaim could not be maintained. The instruction was refused, and the plaintiff excepted. The ruling was correct. It was not in conflict with the principle that parol evidence is not admissible to contradict, add to, or vary the terms of a written instrument. If the entire contract is not required to be in writing it may be partly written and partly oral; and in such case if the written contract be put in evidence the oral part also may be proved, if not at variance with the written instrument. It was competent to show that the title to the furniture was to vest in the defendant under the oral agreement, because it was not in conflict with the deed. *Terry v. R. R.*, 91 N. C., 236; *Evans v. Freeman,* 142 N. C., 61; *Walker v. Venters,* 148 N. C., 388; *Anderson v. Corporation,* 155 N. C., 132; *Palmer v. Lowder,* 167 N. C., 331;

Spencer v. Bynum, 169 N. C., 119; *Cherokee County v. Meroney,* 173 N. C., 653; *Garland v. Improvement Co.,* 184 N. C., 551.

The plaintiff moved to set aside the verdict for the reason that one of the jurors was related to the defendant. After hearing affidavits the presiding judge found as a fact that the juror was a first cousin of the defendant's first wife, who died about the year 1896, leaving no children, and that the plaintiff's counsel before the jurors were sworn asked the general question whether any member of the jury was related to the defendant. His Honor overruled the motion. Under the circumstances his refusal to set aside the verdict and grant a new trial was a matter within his sound discretion and is not reviewable on appeal. *Spicer v. Fulghum,* 67 N. C., 19.

The other exceptions are not tenable. The judge's construction of the pleadings with respect to the payment of interest becomes academic in view of the fact that the first issue was answered by consent. The defendant's testimony that immediately after the purchase was effected he rented all the property to Blackwell was admissible in corroboration of his previous statements, as was also evidence of his declarations to U. S. Nichols. The contention that the plaintiff had not listed the notes for taxation was abandoned at the trial and, indeed, was not referred to in the evidence. Testimony tending to show that the defendant told Hawkins he was to pay $5,500 for the property, which included the land described in the deed, was not inconsistent with the defendant's position and was properly admitted. The other exceptions are formal.

No error.

FRED KILLIAN v. ANDREWS MANUFACTURING COMPANY.

(Filed 31 May, 1924.)

Evidence — Negligence—Employer and Employee—Master and Servant.

In the employee's action to recover damages of his employer, alleged to have been caused by the negligence of the latter's vice-principal by using an insecure appliance in connection with a power-driven cable, which approximately caused the injury in suit, it is competent to show, by a conversation between plaintiff's fellow-servant and the vice-principal, in plaintiff's presence and hearing, that previous to the occurrence the vice-principal had been put upon notice that the implement he was using was dangerous to the plaintiff in the performance of his duties.

APPEAL by defendant from *McElroy, J.,* at January Term, 1924, of CHEROKEE.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered by them in favor of the plaintiff. From a judgment on the verdict, defendant appeals, assigning errors.

Moody & Moody for plaintiff.
Martin, Rollins & Wright for defendant.

STACY, J. Plaintiff, an employee of the defendant, at the time he received his injury, was a member of a skidder crew, engaged in taking the slack out of an overhead cable used by the defendant in transporting logs across a mountain ravine or along the mountain side. The main cable was being tightened by means of a smaller cable drawn around the drum of the skidder engine, and this smaller cable was fastened to the larger cable by a logging chain. A link in this chain broke or gave way, causing the main cable to fall against the plaintiff's leg, inflicting serious injury and rendering its amputation necessary.

Plaintiff testified that a few minutes before the injury Tom Payne, who was engaged in fastening the two cables together, said to John Gibbs, the foreman in charge of the work: "John, that chain won't hold." Gibbs replied: "Oh, yes, it will hold." Payne said: "You are the doctor," and proceeded to tie the two cables with the chain which broke and caused plaintiff's injury. Defendant contends that this evidence was incompetent and that its admission, over objection, should be held for reversible error. But it will be observed that this conversation was had in the presence of and with John Gibbs, defendant's representative in charge of the work. Such evidence was held to be competent in *Jenkins v. Long,* 170 N. C., 269, as tending to fix the defendant with previous knowledge of the existing danger. It was not denied by Gibbs. In fact, the defendant offered no evidence, but rested its case at the close of plaintiff's evidence. The exception must be overruled.

The remaining exceptions and assignments of error present no new or novel point of law not heretofore settled by our decisions. A careful perusal of the record leaves us with the impression that the case has been tried substantially in agreement with the law bearing on the subject, and that the validity of the trial should be upheld.

No error.

DILLON, RECEIVER, v. MONROE COTTON MILLS.

(Filed 31 May, 1924.)

1. Wills—Devise—Power of Sale—Married Women—Privy Examination.

Upon a devise of land to the several children of the testator, for them to divide among themselves, etc., it is unnecessary that one of them, a married woman, acting in accordance with the devise, have her privy examination taken in the mutual conveyance necessary for the division.

2. Wills—Devise—Trusts—Implied Power of Sale—Estates—Remainders.

Upon a devise of land in trust to the testator's son to use for himself and his named children the rents, issues, profits and interests, as they may be needed for the proper maintenance of himself and family and for the purpose of advancing his children and starting them in life, and authorizing him to advance to each thereof such money or property as he may deem proper for their best interest, provided there be no preference given among them, etc.: *Held*, whether the children held a contingent or vested interest, under the further terms of the devise to them, the trustee had the implied power to sell and convey the lands and hold the proceeds subject to the limitation imposed by the trust.

3. Same—Contingent Interests—Statutes.

Where it appears by the record of the lower court and from the commissioner's deed that a sale of lands had been made affecting contingent interests in remainder, in pursuance of and in conformity with the statute on the subject, the fact that it was called in the case agreed a special "proceeding," and that the original papers have been lost from the clerk's office, will not affect the fact that it was a proceeding brought under the statute, and the validity of the sale thereunder will be upheld.

CONTROVERSY without action, submitted and heard by consent before *Devin, J.*, at May Term, 1924, of the Superior Court of MECKLENBURG.

From the facts properly presented it appears that the Bear Skin Cotton Mills, having become involved, an action was instituted to liquidate and distribute its assets in accordance with law, in which said action plaintiff, T. P. Dillon, was duly appointed receiver with authority and directions to sell the plant, etc.

Acting under said powers, the plaintiff has contracted to sell said plant—mills and some outlying property—to defendant at the price of $122,350, stipulating for the making of a good title, which said bid was duly reported to the court and confirmed at May Term, 1924, and title ordered to be made. Defendant company, admitting the contract, resist further compliance on the ground that the title offered is defective. The court, being of opinion with the plaintiff, entered judgment that defendants comply with the contract, from which said judgment defendant excepts and appeals.

John C. Sikes for plaintiff.
C. W. Tillett, Jr., for defendant.

HOKE, J. The property in question was owned by H. M. Houston, who died in 1901, having made disposition of the same by his last will and testament in terms as follows:

"It is my will that all the remainder or residue of my property, of whatsoever nature or kind it may consist, shall be divided into three equal parts by my children, R. V. Houston, Ellen E. Fitzgerald and Martha M. Turner, if they can agree or if they prefer it to be done by others or if they cannot agree on a division, then they shall select three disinterested and intelligent freeholders who shall divide the said property as near as possible into three equal parts; one of which said parts I devise and bequeath to Martha M. Turner in trust for herself and children, R. F. Turner, Daisy Youngblood, Charlie Turner and Callie Turner, using so much thereof during her natural life as shall be necessary for her comfortable maintenance and support and the support and education of her children above named, and my daughter, Martha M. Turner, is authorized to give R. F. Turner, Daisy Youngblood, Charlie Turner and Callie Turner, as her judgment may dictate, such part or parts of the property devised and bequeathed in this item as will be for the interests and advancement of such child, provided the sums given shall not be more than the share to which the one advanced shall be entitled. If any of said children, R. F. Turner, Daisy Youngblood, Charlie Turner or Callie Turner should die without children, the share of such one shall be given to the survivors or survivor of them, and if any of said children should die leaving children, then the children of the deceased child shall be entitled to and receive such part of my estate herein devised or bequeathed as their parents would have been entitled to if living.

"I also devise and bequeath to R. V. Houston in trust one-third of the property divided by my children or freeholders as hereinbefore directed; to have and to hold the same for the use and benefit of himself and children, so that he shall use the rents, issues, profits and interests as they may be needed for the proper maintenance of himself and family; and for the purpose of advancing his children and starting them in life, he is authorized and empowered to advance and deliver to any or all of his children such money or property as he may deem proper for their best interest: *Provided,* in the advancement or delivery of money or property to any one of them he shall make an equitable and just division or distribution among his children so that there shall be no undue preference except that he may discriminate as to the time of making the advancements; and if any of R. V. Houston's children

shall die leaving children, the child or children of such a deceased child or children shall represent the deceased child or children and be entitled to such part of the property herein devised and bequeathed as such deceased child or children would have been entitled to receive if living."

Pursuant to the directions in this item of the will, the property embraced therein, consisting of both real and personal estate, choses in action, etc., was in 1902 divided by the three named children of the testator, and a written deed of partition of the same was formally executed and signed by the three and by L. A. W. Turner, the husband of M. M. Turner, and the land in controversy was embraced in the portion assigned to R. V. Houston, the son, who was also executor of the will.

No privy examination of M. M. Turner was taken as to the execution of this instrument of partition, but it appears that R. V. Houston and his children and assignees have been in the open and notorious possession of the property assigned to him, asserting ownership since the date of said partition.

The particular property in controversy here consisted of a tract of 3.05 acres, and was embraced in a deed made in December, 1905, by R. V. Houston, commissioner, conveying same to the Monroe Cotton Mills, the deed purporting to be made under a decree of the Superior Court for purposes of reinvestment, and this interest so conveyed has been passed by mesne conveyances to the Bear Skin Cotton Mills, and is the title offered by plaintiff as to that portion of the land bargained to defendant. Also a tract of thirty-five acres, part of the land assigned to R. V. Houston in the partition of H. M. Houston's property and after the death of R. V. Houston, in January, 1914, was divided by his children and grandchildren in court proceedings, the thirty-five acres in question being awarded and assigned to three of R. V. Houston's children, to wit, Margaret Payne, R. S. Houston and Octavia Houston, and later these three instituted proceedings for partition by sale; J. C. M. Vann being commissioner, who regularly sold and conveyed same to Charles F. Helms, and this interest has passed by proper mesne conveyances to the Bear Skin Mills, and is held and offered as a proper title by plaintiff in this cause.

It is objected that the title offered as to both of these tracts is defective by reason of the fact that M. M. Turner, one of the children of H. M. Houston, was a married woman at the time of the alleged partition and same is void as to her for want of her privy examination taken. But this partition was pursuant to a power to that end expressly conferred by the will of the father, and it is fully recognized here and elsewhere that in the execution of a power by a married woman, whether collateral or appendant and appurtenant or in gross, the joinder of the husband is not necessary unless it should be so re-

quired by the instrument conferring the power. *Taylor v. Eatman,* 92 N. C., 601-607; *Ladd v. Ladd,* 8th Howard, p. 10; 21 R. C. L., p. 791, title Powers, sec. 23; 31 Cyc., p. 1097. And as to limitations contained in a deed by which such a power is created, see *Cameron v. Hicks,* 141 N. C., 26; *Kirby v. Boyette,* 116 N. C., 167; *Hardy v. Holly,* 84 N. C., 667.

The original partition, therefore, being valid and the property thereunder having been thereby allotted to R. V. Houston, the title to the 3.05 acres will depend upon the proper construction of the last clause, in item nine of the will, and the validity of the deed from R. V. Houston, commissioner, to the Monroe Cotton Mills, made in 1905, and passed by mesne conveyances to the Bear Skin Cotton Mills.

The property covered by this clause, as heretofore stated, consisted of both real and personal property, etc., and is herein devised to R. V. Houston in trust for himself and children, etc., with a limitation also in favor of the children of such as should die, and considering the terms and purpose of the devise and the broad and inclusive powers conferred upon the trustee, we are of opinion that whether the interest passed to the children be vested or contingent, the trustee had the implied power to make sale and conveyance of any of the property in furtherance of the trust imposed upon him, and the proceeds to be held by him subject to the limitations under which he received and held the fund. An interpretation that is fully supported by the well-considered case of *Foil v. Newsome,* 138 N. C., 115-123, and in which *Associate Justice Connor,* delivering the opinion, said:

"We are also of opinion that the trustee has by implication the power to sell land for the purpose of converting it into income-producing property. The usual rule adopted by the courts is to find, in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property, an implied power to sell real estate to the end that he may discharge such duty." *Ladd v. Ladd, supra,* is in approval of the same position.

The executor and trustee, in our opinion, had the power to make the conveyance of 1905 without additional authority from a court proceeding, but there evidently being some doubt as to whether the devise to or for the children conveyed a vested or contingent interest, the trustee applied to the courts, all persons in interest appearing to have been made parties, and obtained a decree for sale of this property for reinvestment, and acting under that decree and the powers therein conferred, he conveyed this special property to the Monroe Cotton Mills, and same has been passed by mesne conveyances to the Bear Skin Mills.

The papers in this proceeding are lost, and in the statement of case agreed it is termed a special proceeding. But the entry on the special

proceedings minute docket shows that it was a proceeding for sale for reinvestment; that all parties in interest were before the court, and the deed of conveyance presented in evidence contains recital that the decree was signed by the Honorable Garland S. Ferguson, judge of the Superior Court, riding the district, and we are fully justified in holding that the same is a Superior Court procedure, authorized by statute as a sale for reinvestment, and thereby giving assurance, if any were needed, that the title now offered is a good one. *Pinnell v. Burroughs,* 172 N. C., 182, and *Everett v. Newton,* 118 N. C., 919. Even if it was a special proceeding, as appellant contends, and though contingent interests are involved, the defect, if conceded, would seem to be cured by section 1745 of Revisal, validating all such sales, provided same shall not impair or destroy vested rights. The deed, then, of R. V. Houston as commissioner should be held valid, and in any event would avail to pass the property as being in the execution of powers existent under the terms of the will and in the due exercise of the same. *Matthews v. Griffin, ante,* 599; *Taylor v. Eatman,* 92 N. C., 601.

As to the thirty-five acres that, as stated, also passed to R. V. Houston under the partition, and became subject to the second clause of item 9 of the will. There is some discussion as to whether the interest of the children under that item of the will is vested or contingent, and without definite decision on that subject we are inclined to the opinion that same is contingent and remained so until one or more of them should have been advanced by their father under the powers contained in the will; and, in any event, it is clear that they would all become vested at latest on the death of R. V. Houston. For a learned discussion of the principles applicable, see *Witty v. Witty,* 184 N. C., 375; and the question is also presented in *Jenkins v. Lambeth,* 172 N. C., 468.

From the facts stated it further appears that after the death of R. V. Houston, by proceedings in court duly instituted, partition was made of the property remaining and undisposed of among his children, and this thirty-five acres was allotted to three of his children, Margaret Payne, R. S. Houston and Octavia Houston, and they having instituted proceedings for the purpose, the same was regularly sold for division, and the title, made and executed pursuant to decrees made in the cause, has been passed to the Bear Skin Mills, and is also held and offered by its receiver.

It is stated that the papers in the partition proceedings have also been lost, but from the entry and decrees on the dockets and the county registry it appears that division of the lands was had in the special proceedings. That the partition was confirmed, and it is further stated in the facts that as a result of the proceedings the thirty-five acres were allotted to the three children as heretofore stated. There seems to be

no serious objection to the title to this part of the property, the exceptions offered amounting to no more than irregularities not substantially affecting the validity of the title. On the entire record we are of opinion that the questions have been correctly decided and the judgment of the court below is affirmed.

Judgment affirmed.

VIRGINIA-CAROLINA CHEMICAL COMPANY v. L. E. WALSTON, ADMR., W. M. MOORE, DECEASED, AND SUE K. MOORE.

(Filed 31 May, 1924.)

1. Partnership—Debtor and Creditor—Individual Liability—Statutes.

Under the provisions of our statute, C. S., 3259, the liability of each partner for the firm's debts is made both joint and several, and the English equitable doctrine that requires the firm's creditors to exhaust the partnership assets and then call in aid the property of the individual partner for the unpaid balance of the firm's debts no longer obtains in this jurisdiction. As to whether the individual and private creditors of a deceased partner are entitled to share ratably with the creditors of the partnership in the deceased partner's interest in the firm assets, *quere?*

2. Dower—Husband and Wife.

Dower is the life estate to which every married woman is entitled, upon the death of her husband intestate, or in case she shall dissent from his will, to one-third in value of all the lands, tenements and hereditaments, both legal and equitable, of which her husband was beneficially seized, in law or in fact, at any time during coverture, and which the issue, had she any, would have inherited as heir to her husband; and this right is not subject to the claims of his creditors. C. S., 4098.

3. Same—Debtor and Creditor—Liens—Mortgages—Equity.

In the settlement of an insolvent estate of a deceased person leaving a widow, where several tracts of land, mortgaged and otherwise, are involved, the mortgagee of lands insufficient to pay his lien, after a sale subject to the widow's dower, may, as to the balance remaining due, share ratably with other debts to be paid out of the personal property of the decedent, and should any balance be then due him, it is a charge to the extent of the residue unpaid, upon the dower land embraced in his mortgage, but not upon the dower in any other lands; and the widow takes her dower in each tract separately and works out her equity against each mortgagee as he seeks to enforce his mortgage lien.

4. Same—Liens—Collateral Security.

Where the wife joins in the mortgage of her husband on his lands, she conveys her right of dower in the entire tract of land described in the instrument, as a collateral security for the payment of his mortgage debt; and by executing the mortgage her inchoate right of dower is not reduced to the amount of the mortgage debt, and after her husband's death her right of dower extends to the entire tract embraced in the mortgage.

5. Same—Administration—Personal Assets.

Where the wife has executed a mortgage with her husband on his lands and he dies, leaving an insolvent estate, the unsecured creditors are entitled to have the mortgagee exhaust the collateral security by a sale of the excess over the dower of his surviving widow before prorating in the personal estate, reducing the mortgage debt to that extent, and should there then remain anything due on his mortgage debt, it may be collected out of the widow's dower in the lands described in the conveyance.

6. Same.

Where the estate of the deceased husband is insolvent and his widow has joined with him in mortgaging his land, and the sale of the lands is insufficient to pay the mortgage debt, the widow becomes *ipso facto* a creditor of her husband, to the extent of the value of her dower in the lands so sold, not subject to the claims of unsecured creditors of his estate.

7. Same—Conversion.

Where the wife has joined with her husband in mortgaging his lands, the proceeds of the sale of the mortgaged lands after his death, the wife surviving him, to the extent of the value of her dower therein, attaches to the fund arising from said sale, which, *pro hac vice*, is still to be deemed real estate.

8. Same—Purchase Money—Mortgages.

To the extent of a mortgage debt on lands given for the purchase money, and registered at once, the title does not rest in the purchaser for any appreciable time but passes through his hands without stopping and immediately vests in the mortgagee free from a lien of any character existing against the purchaser; and while the *title* of such mortgagee is superior to the widow's dower, she is entitled therein against the rights of other creditors of her deceased husband's estate, *sub modo*, to the value of the lands.

APPEAL by plaintiff and defendants from *Bond, J.*, at chambers, Rocky Mount, 12 March, 1924. From EDGECOMBE.

Controversy without action. The essential facts agreed are as follows:

1. Corbett & Moore was a partnership composed of R. L. Corbett and W. M. Moore, and prior to 21 March, 1923, did a mercantile business in Macclesfield, N. C.

2. W. M. Moore, a member of said firm, died on 21 March, 1923, and L. E. Walston duly qualified as administrator of his estate.

3. After the death of W. M. Moore, J. S. Howard and R. L. Corbett were appointed receivers of the partnership assets of Corbett & Moore, and they are now duly administering same under orders of court.

4. The partnership firm of Corbett & Moore is indebted to the plaintiff in the sum of $12,357.84; and the full amount of said claim has been filed with the receivers and also with the administrator of the estate of W. M. Moore, deceased.

5. The assets of Corbett & Moore are not sufficient to pay more than 35 per cent of the claims of the partnership creditors, and R. L. Corbett, the surviving partner, is insolvent.

6. W. M. Moore died seized and possessed of several lots or tracts of land in which his widow, the defendant Sue K. Moore, was entitled to dower; but the same were encumbered by deeds of trust in excess of their value, except a one-half interest in one lot in Macclesfield. All of said tracts of land have been sold at foreclosure sales under the respective deeds of trust. Two of said lots were conveyed to B. T. Pittman, trustee, to secure balance of purchase price of $8,200.00 on said lots, and brought only $7,600.00 at trustee's sale. Sue K. Moore joined in the execution of all the deeds of trust, relinquishing her dower interests therein.

7. The estate of W. M. Moore, deceased, will not exceed $9,000.00 in value; his individual debts amount to approximately $3,000.00, and the liabilities of the partnership firm of Corbett & Moore will exceed $62,000.00.

8. The defendant, Sue K. Moore, has filed a claim with the administrator for what she alleges to be the present cash value of her dower interest in the several tracts of land sold under the trust deeds as aforesaid, estimating such dower upon the basis of the value of the several tracts as fixed by such sales.

Upon the facts agreed, it was adjudged by the court:

"1. That the claim of the plaintiff against Corbett & Moore, which has been filed with the administrator of W. M. Moore, is entitled to prorate in the assets of the estate of W. M. Moore with the individual, open, unsecured creditors of W. M. Moore upon such portion of such claim as shall remain unpaid after first crediting thereon all dividends received from the estate of Corbett & Moore, the copartnership primarily owing the same, *i. e.*, that such claim is allowable against the estate of W. M. Moore only to the extent of the balance due thereon after crediting dividends received in the settlement of the partnership estate of Corbett & Moore.

"2. That the indebtedness against the two tracts of land conveyed by W. M. Moore to B. T. Pittman, trustee, being for purchase money and the indebtedness being in excess of the value of the land, the defendant, Sue K. Moore, widow of W. M. Moore, is not seized of such a dower interest therein as would entitle her to prove any claim against her deceased husband's estate by reason of the foreclosure sale of said land under said trust deed.

"3. That as to the other parcels of land, the defendant, Sue K. Moore, is entitled to have the present cash value of her dower interest therein ascertained without respect to the mortgages thereon, such present cash

value to be ascertained upon the basis of the value of such land at the time of the death of W. M. Moore, and to have her claim for dower in the amount of the present cash value thereof as so ascertained allowed as an open, unsecured claim against the estate of W. M. Moore, and she is entitled to prorate thereon with the other open, unsecured creditors of W. M. Moore.

"4. That the defendant, Sue K. Moore, has not waived her right to dower and is in nowise estopped to set up and claim reimbursement out of the personal estate of W. M. Moore on account of the sale of her dower interest under the several trust deeds signed by her for the purpose of releasing her dower interest as security for the payment of the several amounts secured by such trust deeds, but that such claim has no priority over the other unsecured claims against the estate of W. M. Moore, deceased."

Upon exceptions duly entered, both sides appeal, assigning errors.

M. V. Barnhill for plaintiff.
W. O. Howard for defendants.

PLAINTIFF'S APPEAL.

STACY, J. There are only two questions presented by plaintiff's appeal, and they arise upon the following exceptions and assignments of error:

"1. For that his Honor erred in holding that the claim of plaintiff is allowable against the estate of W. M. Moore only to the extent of the balance due thereon after crediting dividends received in settlement of the partnership estate of Corbett & Moore.

"2. For that his Honor erred in holding that the defendant, Sue K. Moore, has not waived her dower right."

It is the general rule in equity that partnership creditors are entitled to have the partnership assets first applied to the payment of the debts of the partnership, and the separate and private creditors of the individual partners are entitled to have the separate and private estate of the partners, with whom they have made individual contracts, first applied to their debts. The individual property of the respective partners is not to be applied in extinguishment of partnership liabilities until the separate and individual creditors of said partners have been satisfied, so that neither class of creditors may be allowed to trespass on the fund primarily liable to the other, until the claims of that other shall have been paid in full. Thus, only the excess of either fund would go in aid of the other; and this upon the principle that joint creditors should first look to the joint estate, and individual creditors to the separate estate of the partners, as joint creditors have presumably ex-

tended credit upon the faith of the firm assets and the individual creditors on the faith of the separate estates of the respective partners. *Hassell v. Griffin,* 55 N. C., 117; 20 R. C. L., 1026.

But this reasoning does not obtain with respect to general partners where, by statute, as with us, they are made jointly and severally liable for the debts of the partnership, for the very good reason that the force and effect of the statute, to all intents and purposes, is to convert the creditors of the firm into individual creditors of each member of the partnership. C. S., 3259; *Norfleet v. Ins. Co.,* 160 N. C., 327; *Allen v. Grissom,* 90 N. C., 90; *Mode v. Penland,* 93 N. C., 292; *Hassell v. Griffin, supra.* Hence, where the liability of partners is both joint and several, the inference is entirely permissible, and so understood among our merchants and in business circles, that credit is extended quite as often upon the reputed solvency of the individual members of a partnership, as upon the strength of the assets of the firm.

Speaking to this question in *Rankin v. Jones,* 55 N. C., 169, *Pearson, J.,* said: "In *Hassell v. Griffin, ante,* 117, it is decided that the English doctrine, *i. e.,* where, in consequence of the death or bankruptcy of a partner, a fund composed of the effects of the firm and individual effects is to be applied under the direction of a court of equity, the firm creditors are first to be paid out of the effects of the firm and the individual creditors out of the individual effects, the excess of either fund, if any, going in aid of the other, is so far affected by our statute making all contracts joint and several, and giving an action at law against the personal representative of a deceased joint obligor, that in this State individual creditors have no equity to insist that the individual effects shall be first applied to the payment of their debts. Whether the other branch of this doctrine obtains here, so as to give firm creditors an equity in regard to firm effects, is a question that we are not now called on to decide, because the doctrine, even in England, is not applicable to a case like that now under consideration."

And in *Hassell v. Griffin,* 55 N. C., p. 119, the same learned Justice further observed: "So, according to our law, a creditor of the firm is under no necessity of coming into equity, and of course the court of equity has no right to impose any terms upon him; and it is also a matter of course that a court of equity cannot, at the instance of an individual creditor, interfere and direct that the two funds should be applied, the one to pay firm debts in the first instance and the other to pay individual debts in the first instance, and the surplus of either fund to come in aid, for the plain reason that by the force and effect of the statute a creditor of the firm is made, to all intents and purposes, an *individual creditor of each member of the firm.*

"It being the pleasure of the makers of our law to put the creditor of a firm upon the footing both of a creditor of the firm and a creditor of each and every one of the members of the firm, the English doctrine can have no application, for the very ground upon which it is built is taken away, and a creditor of a firm, under our law, must be supposed to deal as well upon the credit of each member of the firm as of that of the firm, because he has a direct legal remedy against each and all of them."

Where the liability of general partners is joint and several, and the firm assets are not sufficient to pay the firm debts, the creditors of the partnership are entitled to have their claims allowed in full, both as against the assets of the firm and also as against the individual assets of a partner, to the end that they may thus concurrently enforce the two liabilities and obtain their ratable share of each fund. See *In re Peck,* 206 N. Y., 55. This rule is stated by *Walker, J.,* in *Chemical Co. v. Edwards,* 136 N. C., p. 76, as follows: "If a creditor has a right to resort to a fund which is open to him alone, he shall not be thereby precluded from coming in upon the assets of an insolvent estate which are common to all the creditors of the deceased debtor and obtaining a dividend on the full amount of his debt, subject to the common sense and necessary qualification that he does not receive more than the sum due."

It follows, therefore, that plaintiff's first exception, to the extent above indicated, must be sustained.

As to whether the individual and private creditors of the deceased partner, W. M. Moore, are entitled to share ratably with the creditors of the partnership in the deceased partner's interest in the firm assets, as well as in the separate assets of the estate of the deceased partner, is not before us for decision, and we refrain from any discussion of the matter. A determination of this question would call for a consideration of the rights of the surviving partner as well as those of the firm creditors, and the point is not raised by any exception appearing on the present record.

Plaintiff's second exception and assignment of error must be overruled as there is nothing in the facts agreed to show any waiver, on the part of Sue K. Moore, widow of W. M. Moore, of her right to dower. *Trust Co. v. Stone,* 176 N. C., 270; *Lee v. Giles,* 161 N. C., 541.

Error.

DEFENDANTS' APPEAL.

STACY, J. The questions presented by the appeal of the defendants arise upon the following exceptions and assignments of error:

"1. For that his Honor erred in holding that the claim of Virginia-Carolina Chemical Company against the partnership of Corbett & Moore

should prorate with the individual, open and unsecured claims against the estate of the deceased partner, W. M. Moore, after crediting thereon the dividends from the estate of Corbett & Moore.

"2. For that his Honor erred in holding that Sue K. Moore, widow of W. M. Moore, was not entitled to prove her claim for the value of her dower interest in the land conveyed to B. T. Pittman, trustee, to secure purchase money."

It follows from what is said above, in disposing of plaintiff's appeal, that the defendants are not in position to complain at the court's ruling in regard to allowing plaintiff's claim to share ratably with the claims of individual creditors in the separate estate of W. M. Moore, the deceased partner. This exception, therefore, must be overruled.

The second exception and assignment of error presents a more difficult question.

Dower, under our statute, is the life estate to which every married woman is entitled, upon the death of her husband intestate, or in case she shall dissent from his will, to one-third in value of all the lands, tenements and hereditaments, both legal and equitable, of which her husband was beneficially seized, in law or in fact, at any time during coverture, and which her issue, had she had any, might have inherited as heir to the husband. *Pollard v. Slaughter,* 92 N. C., 72; *Allen v. Saunders,* 186 N. C., 349; *Thompson v. Thompson,* 46 N. C., 430; C. S., 4100, and cases cited thereunder. See, also, *Corporation Commission v. Dunn,* 174 N. C., 679. And it is further provided, by C. S., 4098, that the dower or right of dower of a widow, and such lands as may be devised to her under her husband's will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, "shall not be subject to the payment of debts due from the estate of her husband, during the term of her life."

In the settlement of insolvent estates, involving the rights of creditors, secured and unsecured, and those of a widow, it would seem that the creditors are entitled to a sale of the two-thirds of land, not embraced in the dower, and the reversion in the one-third dower land, the proceeds of each sale to be applied first to the mortgage debt, or lien upon the particular tract, and any excess left after discharging said lien to go into the hands of the administrator as assets. But should any piece, at the sale of the interests aforementioned, bring less than enough to pay the mortgage encumbrance upon said tract, then the balance due on said lien would share ratably with other debts in the personal estate, or assets in the hands of the administrator; and if there still be any part of the mortgage debt unsatisfied, it would then be a charge, to the extent of the residue unpaid, upon the dower land embraced in the particular mortgage, but not upon the dower in any other lands. And the

widow must take her dower in each tract separately and work out her equity against each mortgagee as he seeks to enforce his security. It therefore follows that in determining the widow's dower, the value of the land, without deducting the mortgage debt, would form the basis of computation. *Caroon v. Cooper,* 63 N. C., 386; *Creecy v. Pearce,* 69 N. C., 67; *Gwathmey v. Pearce,* 74 N. C., 398; *Askew v. Askew,* 103 N. C., 285.

The widow's dower is not liable for the debts of her husband, except as she may charge the same by conveying her right of dower as collateral security for said debts or any part thereof. When a wife executes a mortgage with her husband she thereby conveys her dower in the property described therein as security for the payment of the debt mentioned in the mortgage. *Gore v. Townsend,* 105 N. C., 232. Prior to the execution of any mortgage the wife's inchoate right of dower was in the whole land. The fact that she executes the mortgage does not reduce her dower right to the excess over and above the mortgage encumbrance, but her dower in the whole tract is conveyed as security for the payment of the debt. The husband's "legal rights of redemption and equities of redemption" (C. S., 4100) were in the whole tract, and hence the widow's claim for dower extends to the whole tract.

Before the mortgagee can enforce his security against the widow's dower, after the death of the husband, he must first take his claim out of the personal estate of the deceased (the fund primarily liable), if there be sufficient assets to pay said debt. But if the estate be insolvent, the other creditors are entitled to have the mortgagee exhaust his collateral security by sale of the two-thirds of land not embraced in the dower and the reversion in the dower land before sharing in the personal estate, and the mortgagee's claim will be reduced by whatever amount he derives from the sale of his collateral security, and only the balance of his claim will then share ratably with the other creditors in the personal estate, and should this be not enough to pay the mortgage debt he would then be entitled to collect the residue of his claim out of the widow's dower in the land assigned as security for his debt.

It may be said that where the estate is insolvent, the unsecured creditors are entitled to have the mortgagee exhaust his collateral security, including his lien upon the widow's dower in said land, before sharing with them in the personal estate. This might be so but for the fact that the widow's dower is superior to the rights of unsecured creditors. And with respect to the personal estate, creditors have no priority of claim, except those allowed by C. S., 93, and the widow is entitled to dower as against unsecured creditors, devisees and legatees. *Creecy v. Pearce, supra; Campbell v. Murphy,* 55 N. C., 357.

We are not inadvertent to the provisions of C. S., 93, by which the personal representatives of a decedent are required to pay, as a first class, having priority over all others, the debts which by law have a specific lien on property to an amount not exceeding the value of such property. *Moore v. Byers,* 65 N. C., 240. But here the lien in question exceeds the value of the property, and the estate is insolvent.

It is also held with us that where the whole land, including the widow's dower, as in the instant case, has been sold under the mortgage or trust deed to pay the debt secured thereby, the widow becomes *ipso facto* a creditor of her husband's estate to the amount of the value of her dower in the land so sold. *Trust Co. v. Benbow,* 135 N. C., p. 312; *Gore v. Townsend,* 105 N. C., 228; *Gwathmey v. Pearce,* 74 N. C., 398. But as the widow's dower is not "subject to the payment of debts due from the estate of her husband," her claim as a creditor to the amount of the value of her dower in the land sold under mortgage or trust deed would be preferred over the claims of unsecured creditors, because her claim to the amount of the value of her dower therein attaches to the fund arising from said sale, which, *pro hac vice,* is still to be deemed real estate. *Creecy v. Pearce,* 69 N. C., 67; 19 C. J., 491.

The mortgage or trust deed under which some of the lands here in question were sold was a purchase-money mortgage, or trust deed given to secure the balance of the purchase price, and these lands were sold for less than the purchase-money encumbrance. Hence, it is the contention of the plaintiff that the defendant, Sue K. Moore, widow, of W. M. Moore, is not entitled to claim dower in these lands.

It is generally held that when a vendor conveys property and simultaneously takes back a mortgage to secure the payment of all or a part of the purchase price, and such mortgage is at once registered, the title to the property conveyed does not *rest* in the purchaser for any appreciable length of time, but merely passes through his hands, without stopping, and *vests* in the mortgagee. During such instantaneous passage no lien of any character held against the purchaser, dower or homestead right, can attach to the *title,* superior to the right of the holder of the purchase-money mortgage. *Humphrey v. Lumber Co.,* 174 N. C., 520; *Hinton v. Hicks,* 156 N. C., 24; *Bunting v. Jones,* 78 N. C., 242. This does not change the relative position of mortgagor and mortgagee as between the purchaser and vendor of the land, but it simply gives to the holder of the purchase-money mortgage priority or precedence over other claims and liens held against the vendee, not upon the ground of any superior equity in the vendor or mortgagee *as such,* but simply upon the ground that the two instruments, having been executed simultaneously, are regarded in law as concurrent acts or as component parts of a single act. *Moring v. Dickerson,* 85 N. C., 466; *Weil v. Casey,* 125 N. C., 356.

In *Overton v. Hinton,* 123 N. C., 1, it was held that a widow was entitled to dower, *sub modo,* in land purchased by her deceased husband, but not fully paid for at his death, and upon which a trust deed had been executed during the lifetime of the husband to secure a part of the purchase price of the land. And to like effect was the holding in *Smith v. Gilmer,* 64 N. C., 546; *Thompson v. Thompson,* 46 N. C., 430; *Klutts v. Klutts,* 58 N. C., 80; *Love v. McClure,* 99 N. C., 290; *Howell v. Parker,* 136 N. C., 373.

"The law favors dower, and this Court has held, in *Caroon v. Cooper,* 63 N. C., 386, that the widow is entitled to have dower assigned out of the whole tract, and cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third covered by her dower is insufficient to pay off the encumbrance of the purchase money." *Settle, J.,* in *Ruffin v. Cox,* 71 N. C., p. 256.

It follows, therefore, that the defendants' second exception and assignment of error must be sustained. The cases of *Rhea v. Rawls,* 131 N. C., 453, and *Bunting v. Jones,* 78 N. C., 242, are not at variance with this position.

Each side will pay its costs incurred on this appeal.

Error.

J. V. ERSKINE, M. A. ERSKINE AND J. M. ERSKINE, INDIVIDUALLY AND AS PARTNERS, DOING BUSINESS AS ERSKINE MOTORS COMPANY, AND ERSKINE MOTORS COMPANY, A CORPORATION, v. CHEVROLET MOTOR COMPANY AND CHEVROLET MOTOR COMPANY OF ATLANTA.

(Filed 31 May, 1924.)

1. Contracts—Vendor and Purchaser—Principal and Agent—Issues—Appeal and Error.

Where the pleadings and evidence raise a question of fact necessary to the complete termination of the controversy, the issue so presented and aptly tendered may be insisted upon by a party, and its refusal by the trial judge is reversible error.

2. Same — Automobiles — Local Territory — Pleadings — Evidence — Questions for Jury.

Where a manufacturing company of automobiles has contracted to place its local agency for exclusive sale with the plaintiff in the action at two towns in adjoining territory, and has breached its contract as to one of them, and the pleadings and evidence tend to show that it was necessary for the plaintiff to have the agency in both places to obtain the benefits under his contract, a material and necessary issue to the determination of the controversy is thereby raised for the determination of the jury.

ERSKINE *v.* MOTOR CO.

APPEAL by defendant from *Ray, J.*, at March Term, 1924, of BUNCOMBE.

This is a civil action.

Mark W. Brown for plaintiffs.

Merrimon, Adams & Johnston and Frank A. Gaynor for defendants.

CLARKSON, J. This case has been here twice before. The first time on the right of removal to the Federal Court, 180 N. C., 619. The second time the judgment of nonsuit in the court below was reversed, 185 N. C., 479. It is with reluctance that we feel compelled to grant a new trial in the present case.

It is alleged by plaintiff that:

"On or about 1 December, 1919, the plaintiffs, after considerable negotiations with the defendants, entered into contracts by which plaintiffs became the representatives of the defendants at Asheville and Hendersonville for the sale of Chevrolet automobiles, motor trucks, parts, accessories and supplies, and it was at that time understood and agreed that plaintiffs would handle said automobiles, motor trucks, parts, accessories and supplies at Hendersonville for the reason that plaintiffs were to handle the same automobiles, motor trucks, parts, accessories and supplies at Asheville, said Hendersonville representation being a part of one and the same business to be conducted by plaintiffs at both places, and under the names aforesaid; and pursuant to said arrangement plaintiffs and defendants entered into articles of agreement marked Exhibits 'A' and 'B' respectively.

"That pursuant to said articles of agreement marked 'A,' the plaintiffs gave and the defendants accepted 'Shipping Order' for delivery at Asheville of one hundred and fifty-two (152) Chevrolet automobiles and motor trucks, as will better appear by reference to said 'Shipping Order,' marked Exhibit 'C,' the same being subject to the terms and conditions of the price list furnished by the defendants to plaintiffs.

"That pursuant to said articles of agreement marked Exhibit 'B,' the plaintiffs gave and the defendants accepted 'Shipping Order' for the delivery at Hendersonville of fifty-five (55) Chevrolet automobiles and motor trucks, as will better appear by reference to said 'Shipping Order,' marked Exhibit 'D,' the same being subject to the terms and conditions of the price list furnished by the defendants to plaintiffs.

"That the plaintiff went to great expense in making preparations to handle said Chevrolet automobiles, motor trucks, parts, accessories and supplies after said contracts had been entered into between plaintiffs and defendants as aforesaid; and while plaintiffs were engaged in advertising said automobiles and motor trucks in the counties of Buncombe, Madison, Yancey and Henderson, as provided in said contracts,

plaintiffs were made aware that efforts were being made to induce the defendants to cancel said contracts with plaintiffs and said shipping orders which defendants had accepted from plaintiffs, and plaintiffs forthwith notified defendants that they had been put and were being put to great expense, both in time and money, in furtherance of their business of selling Chevrolet automobiles and motor trucks in said territory, and that they would suffer great loss and damage should said contracts and shipping orders be canceled, and that they would not continue as representatives of defendants aforesaid if there was any probability of the cancellation of said contracts and said shipping orders, and defendants thereupon assured and agreed with the plaintiffs that said contracts and said shipping orders would not be canceled, and that plaintiffs would be continued as representatives of defendants in said territory, and that said shipping orders covering said Chevrolet automobiles and motor trucks for the months of January, February, March, April, May, June and July, 1920, should and would be filled, and that said automobiles and motor trucks therein specified should and would be delivered by defendants to plaintiffs promptly, so as to enable plaintiffs to sell said Chevrolet automobiles and motor trucks during the spring and summer of 1920; and as a result of said assurances and agreements plaintiffs continued to use both time and money in promoting their said business and in advertising, selling, and offering for sale defendants' said automobiles and motor trucks, as aforesaid, as defendants well knew."

These allegations are all denied by defendants.

When this case was here on the question of nonsuit (185 N. C., 489) it was held: "If the original contracts (Exhibits 'A' and 'B') were not binding, and the oral agreement of 18 December, 1919, was the first and only contract, or if Exhibits 'A' and 'B' did constitute obligations which were modified and made certain by the subsequent oral agreement of 18 December, 1919, is not material. The defendants are bound by the subsequent oral agreement of their general sales agent, whereby defendants modified the original contracts (Exhibits 'A' and 'B') and bound themselves to deliver the particular automobiles specified in the shipping orders, and at the time therein stated. *Lane v. Engineering Co.*, 183 N. C., 307."

It will be noted that there were two separate and distinct contracts, Exhibit "A" relating to delivery at Asheville and Exhibit "B" relating to delivery at Hendersonville. Exhibit "A," relating to the Asheville agency, was signed "Erskine Motors Co., per M. A. Erskine, Prest." This contract called for the delivery of 152 Chevrolet automobiles, etc., at Asheville, N. C. Exhibit "B," relating to the Hendersonville agency, was signed "Hendersonville Motors Co., by M. A. Erskine, Prest." This

contract called for the delivery of 55 Chevrolet automobiles, etc., at Hendersonville.

It was contended by plaintiffs (185 N. C., 486) that "On 21 January, 1920, the defendants 'arbitrarily and without reason canceled their verbal agreements,' and refused to deliver the automobiles covered by the shipping orders, and on 2 February, 1920, the notice of cancellation was confirmed. The plaintiffs replied that they were surprised and disappointed at the action of the defendants, and called attention to the fact that plaintiffs could not satisfactorily handle defendants' automobiles at Hendersonville if they were deprived of the agency at Asheville, it being fully understood that the Asheville and Hendersonville agency were to be carried on together, and that the Hendersonville agency was not profitable without the Asheville agency. Thereupon defendants canceled their verbal and written agreements relating to the Hendersonville agency."

The defendants contend that, admitting the oral agreement to be true as to the Asheville agency, and it was canceled in violation of the alleged oral modification, that the Hendersonville contract should be entirely eliminated from consideration. "That none of the plaintiffs in this case have any standing in this suit in so far as the Hendersonville agreement is concerned; that it was an entirely separate and independent agreement; that no reference was made to it, or about it, in any oral agreement made by Herold; that such oral agreement, if made, related solely to the Asheville agreement if violated, was violated by the Hendersonville Motors Company itself in its refusal to perform, and no damage whatever was sustained, unless by the defendants, by such refusal. The Hendersonville Motors Company agreed to the diversion of the cars there, contended that the dealings in regard thereto should be liquidated and settled, their money deposit was returned, and all matters relating to the Hendersonville agreement were settled. Plaintiffs had done absolutely nothing in the way of performance there."

On the other hand, plaintiffs contend that these agencies were to be handled together. On 21 January, 1920, M. J. Herold, sales manager for defendants, sent the following letter to M. A. Erskine, Erskine Motors Company, Asheville, N. C.:

"DEAR SIR:—This is to inform you that we are today canceling your selling memorandum with us, to take effect immediately, in accordance with clause No. 8 of our selling memorandum.

"Therefore we are instructing our accounting department to return to you your deposit, less any amount that may be due the Chevrolet Motors Company of Atlanta. We have instructed our Mr. Jas. E. Green, factory representative for your territory, to this effect.

"Wishing you every success in the future, we remain,

Yours very truly."

This letter was in reference to canceling contract, Exhibit "A," relating to Asheville agency.

On 24 January, 1920, the Erskine Motors Company and Hendersonville Motors Company sent the following telegram to Chevrolet Motors Company, Atlanta, Ga.:

"We are surprised and disappointed to learn that you will not comply with your agreement with us for the delivery of Chevrolet automobiles in 1920. There is a carload of automobiles at Hendersonville consigned to us, and would like to know if the agency there is also to be canceled. We cannot satisfactorily handle Chevrolet automobiles at Hendersonville without handling same cars at Asheville."

Several letters and telegrams passed.

Assignments of error Nos. 11 and 12 are to allowing the questions and answers of M. A. Erskine after the correspondence by telegrams and letters were introduced.

"Q. You speak in these letters and telegrams about handling these two agencies together. What understanding, if any, did you have with the defendants, or either of them, as to the handling of these two propositions? A. Our understanding with them was that we were to handle them together.

"Q. Who was that with? A. Mr. Stocking, the factory representative. A specific arrangement was made to handle them together, but we called the one in Hendersonville the Hendersonville Motors Company and the other in Asheville the Erskine Motors Company, for the simple and sole reason that they objected to giving so much territory to one concern.

"Q. What was the agreement? A. That was the agreement."

On cross-examination, M. A. Erskine said:

"When Stocking came here I knew he was simply a traveling man; I didn't know what he could do; I knew he was the factory representative of the Chevrolet Motor Company; the extent of his authority I didn't know. He told me he was traveling from Atlanta, and he said he could not make any contracts with us. I don't know that he said that definitely, and I knew he couldn't make any contract. . . . We refused to take the cars at Hendersonville after the Asheville contract was canceled. We had eleven cars here, and there was good money in handling them; had five at Hendersonville, but it would not have been profitable in Hendersonville after the Asheville contract was canceled; we could have gotten that carload at Hendersonville, but refused to take them.

"Q. And you refused to take them? A. Yes. After the contract here we could not have advertised them. How could we sell them without advertising them, and another agent in town? We could not sell them

unless we were the agents. We had eleven here and sold them all, and we sold them after they had another agency here, and if we had taken the five cars at Hendersonville we could have brought them here and sold them too.

"Q. And you agreed that they could divert them? A. Yes, sir, because we could not handle them profitably without the Asheville contract.

"Q. And you were waiting damages for those you refused to take? A. Yes, sir."

With the controversy over the Hendersonville contract the defendant in apt time tendered certain issue which was refused, to which exception was taken—assignment of error No. 34. The issue tendered was as follows:

"Did the plaintiffs, doing business as Hendersonville Motors Company, refuse to accept cars shipped under Exhibits B and D, and agree to their diversion, and refuse to carry out the Hendersonville contract, Exhibits B and D?"

We suggest that the word "wrongfully" should be added before the word "refuse" in the issue, upon another trial.

It may not be amiss to call attention to what was said by *Stacy, J.*, in *Mills v. McRae, ante,* at p. 709: "Nevertheless, it is a sound principle of law, and certainly approved in morals, that one who is injured in his person or property by the wrongful or negligent act of another, whether arising *ex delicto* or *ex contractu,* is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."

We think from the entire evidence in the case, the probative force is for the jury, that this was a material and necessary issue to properly present the case to the jury, and the refusal was error.

In *Davidson v. Gifford,* 100 N. C., 22, it is said: "The material issues of fact raised by the pleadings must be submitted to the jury unless, in some way to be seen by the court, the right of a party in this respect shall be waived. This is essential to a proper determination of the action, particularly in respect to the matters of fact therein. *Porter v. R. R.,* 97 N. C., 66. When the pleadings are so framed and directed as to present the case, on the part of the plaintiff or the defendant, in more than one aspect as to the evidence that may be produced on either side, the issues of fact should not be so framed—narrowed in their scope and application—as to exclude any relative pertinent evidence, affecting the merits of the cause of action or the defense alleged; they should be so shaped as to embrace the whole—not simply a part—of the material

allegations controverted, and put at issue by the pleadings. While, perhaps, it may, in some cases, be convenient to submit issues incident and subordinate to and embraced by the principal ones raised, the latter, as we have already said, should always be submitted to the jury, unless they shall be waived, because the trial of them is necessary to settle and conclude all the material controverted allegations of the pleadings; and this may be insisted upon, as of right, by either party to the action. *Henry v. Rich,* 64 N. C., 379; *McElwee v. Blackwell,* 82 N. C., 345; *Porter v. R. R.,* 97 N. C., 66, and the cases cited." *Paper Co. v. Chronicle,* 115 N. C., 149.

In *Mann v. Archbell,* 186 N. C., 74, it is said: "Issues are sufficient when they present to the jury proper inquiries as to all the essential matters or determinative facts in dispute. *Power Co. v. Power Co.,* 171 N. C., 248; *Carr v. Alexander,* 169 N. C., 665; *Roberts v. Baldwin,* 155 N. C., 276." *Irvin v. Jenkins,* 186 N. C., 752.

This material issue of fact was raised by the pleading in the instant case. It was insisted upon as of right by the defendant. It related to a separate contract, and the refusal to submit this issue was, in our opinion, prejudicial and reversible error. We do not think the fourth issue cures the error in not submitting the issue requested.

The record presents 57 assignments of error. As the case goes back for a new trial, we will not consider any other assignments of error. For the reasons given there must be a

New trial.

HARRIET McALLISTER v. GEORGE W. PRYOR, VIRGINIA-CAROLINA AMUSEMENT COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 31 May, 1924.)

1. Negligence—Electricity.

There is nothing by which the user of an electrical appliance can detect the presence of an unusual high voltage or deadliness of current before touching the wire or coming in contact with it, and the greatest degree of care is required of those furnishing this deadly instrumentality to guard against the danger of its ordinary use as the circumstances may require. C. S., 2763, 2764, 2766.

2. Same—Evidence—Res Ipsa Loquitur—Nonsuit—Questions for Jury.

Where the furnisher of electricity for a building was, under its contract with the owner, required to furnish a low voltage of electricity for lighting and various domestic uses, and there is evidence tending to show that in attempting to iron clothes within the building with an electric iron the plaintiff touched the ironer and received a severe shock of elec-

tricity, to her injury, which should not and would not ordinarily have occurred by such use had the defendant supplied the current it had contracted to do, the doctrine of *res ipsa loquitur* applies, and the issue of actionable negligence should be submitted to the jury, denying defendant's motion as of nonsuit thereon.

Appeal by plaintiff from *Harding, J.*, at November Term, 1923, of Mecklenburg.

This is a civil action. From judgment of nonsuit, plaintiff appeals. Reversed.

The plaintiff conceded in this Court that on the evidence adduced in the court below there was no error in the judgment of nonsuit against Geo. W. Pryor and Virginia-Carolina Amusement Company. The only question that will be considered: Is there any sufficient evidence, as shown from the record, to go to the jury, as to the liability of the Southern Public Utilities Company.

The plaintiff contends that the defendant, Virginia-Carolina Amusement Company, was a corporation operating theatres and places of amusement in Virginia and North Carolina, and George W. Pryor was one of the owners and managers. That they were operating what is known as the "Piedmont Theatre" in the city of Charlotte. The plaintiff was an actress and engaged as a performer, and it was her duty to press her aprons, used as a part of her costume, to be worn during the performance, and to press wardrobes. She was furnished with an electric iron for this purpose and was injured as hereinafter stated.

The plaintiff alleges in the complaint: "That the defendant, Southern Public Utilities Company, was negligent, which negligence was the proximate cause of the injury to the plaintiff, in that it failed to properly inspect its said system of wiring, appurtenances and equipment whereby the current was transmitted to the said theatre, as aforesaid, and in permitting the said wiring, appurtenances and equipment to become in such defective condition and such condition that it failed to perform the function for which it was installed in controlling and reducing the current and the voltage, quantity or power of said current which was transmitted to the said building in such low voltage, quantity or power as to be proper and safe for uses in said building; and in negligently permitting the said current to be transmitted to said Piedmont Theatre and its wiring system and equipment in such high voltage, quantity and power as to make it unsafe for persons to use and handle the equipment of said theatre, in the manner in which they were accustomed ordinarily to handle the same; and this said negligence produced the injury to the plaintiff in that the said current of electricity was transmitted to the iron which she was handling, as aforesaid, in a dangerous, unsafe and unusual quantity, voltage and power."

The Southern Public Utilities Company deny these allegations.

From the judgment of nonsuit rendered against plaintiff in the court below she assigns error, and appeals to the Supreme Court.

J. F. Flowers for plaintiff.

Cook & Wyllie for Geo. W. Pryor and Virginia-Carolina Amusement Company.

W. S. O'B. Robinson, Jr., and R. S. Hutchinson for Southern Public Utilities Company.

CLARKSON, J. Upon a motion as of nonsuit upon the evidence, the evidence must be considered in the light most favorable to the plaintiff.

The plaintiff testified: "The iron was connected by the electrician of the house. When I took hold of the iron I started getting a severe shock. I found I was grounded both feet, and I could not release the iron, and I immediately started screaming for help. The electrician came and he rushed up to the socket and tried to turn it off; when he touched the socket it began sputtering and started spitting little flames and knocked him over against the dressing-room. He ran up stairs to the switchboard; at that time in the Piedmont Theatre they had a switchboard with all the switches on it, and he tried to relieve me from the iron by throwing the lever. All the time I was grounded, and I was getting this full shock. This whole side of my right arm, my right side and my right limbs had given away. It was going up into my heart and I thought any moment I was going to meet death, and I started screaming. He shouted to the operator to cut it off, but I have been told since that the operator was deaf and dumb, and of course he could not hear the electrician, and then the electrician ran to the front of the house. I can't say just how the current was cut off; when I was released I fainted and was unconscious. I was taken over to the doctor's, and there I suffered shock and chills, and I found my finger had been severely burned. I was then taken over to my hotel, or rooming house, and there I suffered shock and chills, and it has been a wreck to my system ever since. I have been in a terrible condition and I can hardly use my right arm and right hand in cold weather, and I have a spasmodic condition left in my right arm and hand—it quivers all the time; I have very little use of it. I carried my hand in a sling for 18 weeks, and as a result of this injury I have just the same feeling in my hand as you would have in your foot when it has been asleep. It is a-tingle, and, as I say, a spasmodic condition of tingling, and it is very painful in cold weather. Sometimes I can scarcely move my arms. It was customary at the Piedmont Theatre at that time for members of the company to press a wardrobe in the theatre at each change of the

bill. The pressing was done by an electric iron, and this particular week the electric iron was connected just on the entrance of the stage door. The connection was customarily made to the light socket, and this connection of the iron to the socket was made by an electrician on the day I was injured. He was supposed to be, to the best of my knowledge, in charge of the electric apparatus of the Piedmont Theatre. He was the man who had actual charge of the switchboard in the theatre. He said it would be all right to press and that he would connect the iron for me; for me to get the sheet on which I wanted to iron and use the table that he had put below the socket. I used the table and received the injury at that table immediately. It was when I started to take hold of the iron; of course after he connected it the iron was left to heat, but it was upon my taking hold of the iron."

The measure of care required is stated in 20 C. J., p. 341, sec. 36, as follows: "The measure or degree of care required of electric companies is variously stated—as usual and ordinary care; reasonable care; such care as a reasonably prudent man would exercise under the circumstances; care commensurate with or proportionate to the danger; high degree of diligence and foresight; all that human care, vigilance and foresight can reasonably do; all the foresight and caution which can be reasonably expected of men under similar circumstances; every protection accessible to prevent danger; the utmost degree of care; a high degree of care; a very high degree of care; the highest degree of care which skill and foresight can obtain, consistent with the practical conduct of their business under the known methods and present state of the particular art; the care required to prevent injury; such care and caution as to protect the public, and especially those who might be called upon to come near or in contact with wires, from dangers they could not see and which they might readily overlook. Reasonable care does not require such precautions as will absolutely prevent injury or render accidents impossible. By utmost care and skill is meant the highest degree of care and skill known which may be used under the same or similar circumstances. One using electric currents must take into account the acts of strangers and of the public generally."

Electric appliances are becoming more in use each day. The old methods are giving way to the new. These appliances are used for ironing, cooking, washing, heating, etc. The North and South Carolina Public Utility Information Bureau states that there are now some 52 electric appliances that can be used in the home and elsewhere, such as electric ranges, bake ovens, sewing machine motors, washing machines, churns, disk stoves, dish washers, fireless cookers, fans, grills, ironing machines, etc. Many new uses will yet be discovered. These appliances can be purchased at all the leading electric power stores. These

appliances have been of great benefit and use, saving of time and money, to the women in the homes and in other places. Electricity is recognized as an invisible force, subtle, with dangerous characteristics. It is important to encourage the use of the electric appliances, but it is necessary that this invisible and subtle force shall be carefully guarded. With this knowledge of danger, the National Fire Protection Association, in 1923, recommended a "National Electric Code," known as "Regulations of the National Board of Fire Underwriters for Electric Wiring and Apparatus." It covers the entire electric territory, including heating appliances.

C. S., 2763, is as follows: "The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as the National Board of Fire Underwriters. In order to protect the property of citizens from the dangers incident to the defective electric wiring of buildings, it shall be unlawful for any firm or corporation to allow any electric current for the purpose of illuminating any building belonging to any person, firm, or corporation to be turned on without first having had an inspection made of the wiring by the building inspector, and having received from the inspector a certificate approving the wiring of such building. It shall be unlawful for any person, firm or corporation engaged in the business of selling electricity to furnish any electric current for use for illuminating purposes in any building or buildings of any person, firm or corporation, unless the said building or buildings have first been inspected by the inspector of buildings and a certificate given as above provided. The fee that shall be allowed said inspector of buildings for the work of such inspection of electric wiring shall be one dollar for each building inspected, to be paid by the person applying for the inspection."

C. S., 2764, provides for quarterly inspection of buildings in the fire limits. C. S., 2765, provides for annual inspection of all buildings in corporate limits. C. S., 2766, provides for record of inspection.

The State has an electrical inspector. The cities of the State have city electricians and ordinances requiring persons to be examined and licensed touching their electrical knowledge and ability before they can follow this calling. These electric ordinances in sundry and divers ways make regulations for safety. The Southern Public Utilities Company, under the authority given it, produces and sells electricity as a commercial product. Being engaged in the manufacture and handling of so dangerous a commodity as electricity, it is important that the public, which buys and uses this commodity, know and have confidence that in the distribution of this invisible and subtle power in the home and elsewhere the supply will be safe and convenient in form for domestic

and other purposes, and that every reasonable safeguard will be provided against danger. In the distribution it must be held to the highest degree of care.

The Southern Public Utilities Company, in its brief, contends: "Neither the allegations of the plaintiff's complaint nor her evidence bring her case within the doctrine of *res ipsa loquitur,* so as to give rise to any inference of negligence against the defendant, Southern Public Utilities Company. The plaintiff relies upon the doctrine of *res ipsa loquitur* as declared and applied in the cases of *Turner v. Power Co.,* 154 N. C., 131; *Shaw v. Public Ser. Co.,* 168 N. C., 611. The defendant, Southern Public Utilities Company, also relies upon these two cases."

From the allegations of the complaint and evidence of the plaintiff, we think the evidence is sufficient to be submitted to the jury under the *Turner* and *Shaw cases, supra.*

In the *Turner case* the charge of the court below, which was approved, is as follows: "That while the law does not regard an electric light company an insurer against injury, such a company owes to its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and the utmost diligence and foresight in the construction, maintenance and inspection of its plant and appliances obtainable, consistent with the practical operation of its plant. So it is something more, under the law, as the court understands it, than ordinary care; it is the highest care."

Hoke, J., in the *Turner case, supra,* at p. 137, said: "The presiding judge charged the jury that if the injuries resulted by reason of defective apparatus or appliances existent within the building, they would render their verdict for defendants, and in effect excluded from the consideration of the jury any and all imputation of wrong except that which might arise by reason of an excess of voltage transmitted into the building over the wires of defendants, and by reason of negligent default on the part of the company or their agents. This being true, on the facts in evidence, the case permits and calls for an application of the doctrine of *res ipsa loquitur,* and requires that the question of defendant's responsibility should be determined by the jury. This doctrine has been discussed and applied in several recent cases before this Court, as in *Dail v. Taylor,* 151 N. C., 284; *Fitzgerald v. R. R.,* 141 N. C., 530; *Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 66; *Womble v. Grocery Co.,* 135 N. C., 474."

Walker, J., in the *Shaw case, supra,* p. 617, quotes with approval from *Mitchell v. Electric Co.,* 129 N. C., 169, as follows: "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the

most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and being odorless, the only means of its discovery lies in the sense of feeling, communicated through the touch, of a person, which, as soon as done, he becomes its victim. In behalf of human life and safety of mankind, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." The learned judge quotes, on p. 618, further, with approval: "The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer. Sh. and Redf. on Neg., sec. 59. The case of *Turner v. Power Co., supra,* seems to be 'on all-fours' with this one, as the facts of the two cases are strikingly alike."

The defendant in its brief quotes as follows from *Smith's Admx. v. Middlesboro Electric Co.,* 174 S. W., p. 780 (Ky.), which we think sound in principle except as modified by statute in this State: "The just rule seems to be that the electric light company should not be responsible for injuries received by persons arising solely from the defects in wiring and appliances used for electric lighting purposes within their own houses, and which are owned by them, and over which they have entire control, and where the only connection between the company and the person using the lights is a contract between them and the company for the company to connect its system with the inside wiring of such parties and to deliver a current for their use, in the absence of knowledge on the part of the company of the defective condition of the wiring and appliances of such parties. In such a state of case the company would not owe such person any duty of inspection of their wiring and appliances. *Although such inside wiring and appliances were defective, this would not excuse the company for injuries arising from its sending*

into the house a dangerous current of electricity, and without which the defects in the inside wiring and apparatus would have been harmless." (Italics ours.)

The Kentucky Court, in the same case, at p. 777, lays down the same principle as has been enunciated by this Court: "While an electric light company is not an insurer of the safety of its patrons, nor of people, who may come in contact with its wires and its apparatus while at places at which they have a right to be, and engaged at the performance of things which they have a right to do, it is required to exercise the very highest degree of care and skill in the installation, construction and operation of its plant, and the highest degree of care and skill in the inspection of its wires and appliances and all of its apparatus to prevent injury to persons, and to that end should provide itself with and use the known necessary devices to control its electrical current, and prevent the passing of dangerous currents of electricity into the houses of its patrons, because the patrons of such a company and the persons on lawful business in the houses of the patrons have a right to assume, in the absence of knowledge to the contrary, *that the appliances and fixtures of the company are free from defects which would permit the flow of an unnecessary and dangerous current of electricity into the houses, endangering their lives or safety.* (Italics ours.) . . . The nature of electricity and its operations and what it may do or may not do are things very little understood or known by the masses of the people, and are subjects about which those professing the greatest knowledge of electricity and the effects of it under circumstances dispute. It cannot be seen, and can only be felt, and when the effects of it are felt, it is usually too late for the victim to escape its more deadly effects. The suddenness and destructiveness of its effects are such that those who choose to manufacture and distribute it, although it is a lawful and now almost a necessary business, must be held to the highest degree of care in its distribution."

The extent of the plaintiff's injury, if believed, would indicate an unnecessary and dangerous current of electricity into the theatre, an excess of voltage transmitted. The doctrine of *res ipsa loquitur* applies, which would carry the case to the jury. *White v. Hines,* 182 N. C., 288; *Modlin v. Simmons,* 183 N. C., 65; *Hinnant v. Power Co., ante,* 293.

The judgment of nonsuit as to Geo. W. Pryor and Virginia-Carolina Amusement Company is affirmed. From the view we take of the law, we think the case against the Southern Public Utilities Company should have been submitted to a jury.

For the reasons given, the judgment below is

Reversed.

IN THE MATTER OF THE WILL OF ELLEN F. ELLIS.

(Filed 31 May, 1924.)

1. Wills—Caveat—Domicile—Venue—Husband and Wife—Presumptions—Findings of Fact—Appeal and Error.

Upon motion for a change of venue in proceedings to caveat a will, the testatrix's legal domicile at the time of her death does not solely depend upon her residence in a different county from that of her husband, and where the trial judge, upon a case agreed, finds as a fact only that the testatrix, a married woman, was not a resident of the county of the domicile of her husband, and upon all the evidence in the case it appears that the change of venue sought was to the county of his domicile, the judgment of the trial court in retaining the jurisdiction will be reversed on appeal, and the proceedings ordered removed to the domicile of her husband.

2. Same—Change of Domicile—Animus Revertandi.

The question of domicile of a testatrix in proceedings to caveat her will does not solely depend upon her place of residence, and when all the evidence tends to show that her last residence was in a different county from that of her husband, proper venue of the proceedings is in the county of his domicile.

CAVEAT to the will of Ellen F. Ellis, heard before *Bryson, J.*, at November-December Term, 1923, of HAYWOOD.

Appeal by respondent. The agreed case on appeal in part is as follows:

"There was a caveat to the will of Ellen F. Ellis filed in the Superior Court of Haywood County on 1 September, 1923, and was heard at the November-December Term, 1923, of Haywood Superior Court before his Honor, T. D. Bryson, upon a motion for the change of venue and for removal of said cause for trial to the Superior Court of Cleveland County, N. C., and, from the refusal to grant said motion and the judgment retaining said cause for trial in Haywood County, the propounder and executor of said will appealed to the Supreme Court. The original of the will of Ellen F. Ellis, deceased, is now on file in the office of the clerk of the Superior Court of Cleveland County, where it was probated soon after her death, and R. C. Ellis, the husband of Ellen F. Ellis, and executor and sole beneficiary under the will, duly qualified as the executor of same before the clerk of the Superior Court of Cleveland County. A certified copy of said will was forwarded to the clerk of the Superior Court of Haywood County and duly recorded in his office, and a caveat was filed to the certified copy of said will in the office of the clerk of the Superior Court of Haywood County."

The judgment of the court below was as follows:

"This cause coming on to be heard, and being heard, before the undersigned Honorable T. D. Bryson, Judge, presiding and holding the November-December Term, 1923, of Haywood Superior Court, upon the motion of R. C. Ellis for the change of venue from Haywood County to Cleveland County, and upon the answer filed in opposition to said motion, and upon the affidavit of Joshua Fitzgerald, Charlotte Fitzgerald, Flora Fitzgerald and R. A. L. Hyatt, the court finds as a fact that the testatrix, Ellen F. Ellis, was not a resident of Cleveland County at the time of her death and that she died in Waynesville, Haywood County, North Carolina; that her will has been probated both in the county of Haywood and Cleveland; that she owns real estate in the county of Haywood and that all of the subscribing witnesses to her last will and testament reside in Haywood County, and that Haywood County is the proper place for the trial of said action. It is therefore considered, ordered and adjudged by the court that said motion be and the same is hereby denied, and said cause is retained in Haywood County for trial."

To the judgment respondent excepted, assigned error, and appealed to the Supreme Court for the refusal of the court below to grant the motion to remove this cause to Cleveland County for trial.

Morgan & Ward for caveators.
Ryburn & Hoey and Alley & Alley for respondent.

CLARKSON, J. From the agreed case it appears that the will of Ellen F. Ellis was filed in the office of the clerk of the Superior Court of Cleveland County shortly after her death. It was duly probated in common form and R. C. Ellis, the husband of Ellen F. Ellis, sole beneficiary and executor under the will, duly qualified as such executor. A certified copy of the will was duly recorded in the office of the clerk of the Superior Court of Haywood County. A caveat to the certified copy of the will was filed in Haywood County before the clerk.

The court below in the judgment says: "The court finds as a fact that the testatrix, Ellen F. Ellis, was not a resident of Cleveland County at the time of her death and that she died in Waynesville, Haywood County, North Carolina."

R. C. Ellis, in his motion for removal, filed an affidavit, in part, as follows:

"That Ellen F. Ellis was a legal resident of Shelby, Cleveland County, N. C., at the time of her death and had been domiciled in said Cleveland County, N. C., for more than 28 years preceding the date of her death, and a portion of her estate was situated in said county.

"That the said R. C. Ellis, husband of Ellen F. Ellis, sole beneficiary under said will, and named as executor thereof, has been a resident and domiciled in Cleveland County, N. C., for the past 30 years, and is now a resident of said county, and he duly qualified as executor of the will of the said Ellen F. Ellis before the clerk of the Superior Court of Cleveland County, North Carolina."

The court below makes no finding as to the domicile of R. C. Ellis, husband of Ellen F. Ellis. All the positive evidence, as appears from the record, is that his domicile was in Cleveland County at the time his wife died. Nor does the court find as a fact that Ellen F. Ellis was domiciled in Haywood County, but only finds that she "was not a resident of Cleveland County at the time of her death."

Nash, J., in *Plummer v. Brandon,* 40 N. C., 192, says: "The acquisition of a new domicile does not depend simply upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicile and of abandoning the former, in other words the change of domicile must be made manifest, *animo et facto,* by the fact of residence and the intention to abandon. *DeBonneval v. DeBonneval,* 6 Eng. E. Rep., 502; 1 Curties, 856; *Craigie v. Lewin,* 7 Eng. E. Rep., 460; 3 Curties, 435. *Sir Herberd Jermer Trest,* in the latter case, says the result of all the cases is that there must be the *animus et factum,* and that the principle is that a domicile, once acquired, remains until another is acquired, or the first abandoned; and that the length of residence is not important, provided the *animus* be there; if a person goes from one country to another with the *intention* of remaining that is sufficient, and whatever time he may have lived there is not enough, unless there be an intention of remaining. Again in the case of *DeBonneval* the same Judge lays down this principle, 'the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the *onus* of proving the change is on the party alleging it, and the *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile."

19 C. J., p. 414, sec. 33, says: "Following out the theory of an identity of person, the law fixes the domicile of the wife by that of the husband, and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him; and she cannot during such period of cohabitation effect a separate domicile by her intention that his domicile shall not be hers, even though assented to by him. The domicile of the husband is that of the wife only when the husband provides a domicile where the wife may go and stay at her will. Under modern statutes affecting the status of married women, it has been suggested that there is no reason why a wife may not acquire a separate

domicile for every purpose known to the law, and it has been held that she may do so whenever it is necessary or proper, as where the husband has forfeited his marital rights by misconduct. *But the domicile of the husband is at least prima facie the domicile of the wife.*" (Italics ours.)

In the instant case there was no evidence from the record of any disagreement or separation between R. C. Ellis and his wife, Ellen F. Ellis, as there was in the case of *Rector v. Rector,* 186 N. C., 618. The court below did not find that Ellen F. Ellis was domiciled in Haywood County when she died—apply these principles to the case before us—as a general rule the domicile of the wife is that of the husband. The domicile of the husband is at least *prima facie* the domicile of the wife.

In *Smith v. Morehead,* 59 N. C., 364, it was said: "This being so, the only remaining inquiry is, what effect the marriage had upon the domicile of the parties. Upon this question we think the law is well settled; in the case of *Warrender v. Warrender,* 9 Bligh. Rep., 89, before the House of Lords, it was laid down in the strongest terms that the domicile of the husband drew to it, in law, that of the wife."

In *Hicks v. Skinner,* 71 N. C., 543, it is said: "It must be held, however, that upon the marriage the domicile of the wife, by construction of law, became that of her husband."

It will be noted that in divorce cases "The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by Rev., 1559, under the title of 'Venue,' providing that the summons be returnable to the county wherein the applicant resides, and by amendment, chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendant resides." *Wood v. Wood,* 181 N. C., 227.

In *Thayer v. Thayer, ante,* 574, the plaintiff lived with his grandfather in Montgomery County. He was the illegitimate child of Mamie G. Hall and was nine years old. His mother, Mamie G. Hall, was domiciled in Davidson County, and brought suit as next of friend for her illegitimate child in Davidson County, which venue was upheld. *Adams, J.,* in that case said: "Domicile is of three kinds—domicile of origin, domicile of choice, and domicile of operation of law. As a general rule, the domicile of every person at his birth is that domicile of the person on whom he is legally dependent, and in case of illegitimacy the domicile of origin is that of the mother. A domicile of choice is a place where a person has chosen for himself, but an unemancipated infant, being *non sui juris,* cannot of his own volition select, acquire, or change his domicile. A domicile by operation of law is one which the law determines or attributes to a person, without regard to his intention or the place where he is actually living. It is consequential and

usually arises out of the legal domestic relations, as that of parent and child, or that of the wife, resulting from marriage. In accordance with these principles the domicile of a legitimate child during minority, as a general rule, follows that of the father, but the domicile of an illegitimate child is ordinarily governed by that of the mother."

In re Ryan, ante, 569; *In re Martin,* 185 N. C., 472; *Reynolds v. Cotton Mills,* 177 N. C., 412.

From the findings of fact by the court below, the agreed case on appeal and the evidence, undisputed in the record, as to the domicile of R. D. Ellis, the husband of Ellen F. Ellis, being in Cleveland County, we think, by construction of law, the domicile of Ellen F. Ellis was that of her husband, and the demand and motion for change of venue, made in apt time by respondent, should have been granted.

The cases cited in the brief of caveators as to the findings of fact by the court below, being ordinarily conclusive, have no application in the instant case. The court below did not find facts sufficient to show that Ellen F. Ellis was domiciled in Haywood County.

In *Roanoke Rapids v. Patterson,* 184 N. C., 137, the Court said: "When accurately used, 'domicile' and 'residence' are not convertible terms. Domicile is a person's fixed, permanent, established dwelling-place, as distinguished from his temporary, although actual place of residence."

The findings of the court below that Ellen F. Ellis was not a resident of Cleveland County at the time of her death does not mean that her domicile was not in Cleveland County. Our Senators and Representatives in Congress are residents of Washington most of the time, but they are domiciled in this State. The clerks and officials in governmental departments in Washington and in Raleigh are residents in the respective places, but are domiciled in the different cities and places of the State other than where they reside. Frequently people in the State have homes in the cities and towns in the low country, and homes in the mountains, and are residents for many months of the year in their mountain homes, but their domicile is in the low country. By law, ordinarily, the domicile of the wife is that of her husband.

The judgment of the court below is reversed, and it is ordered that the cause be removed to the Superior Court of Cleveland County for trial.

We have not discussed the other contentions made by respondent for removal; for the reasons given, it was unnecessary. The judgment is

Reversed.

B. F. DELLINGER, ADMINISTRATOR OF TILLMAN DELLINGER, v. ELLIOTT BUILDING COMPANY, INC., AND J. R. ABEE.

(Filed 31 May, 1924.)

1. Evidence—Civil Actions—Dying Declarations—Wrongful Death—Negligence—Statutes.

In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused to be admissible upon the trial in an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and confined to the act of killing and the attendant circumstances forming a part of the *res gestæ*. C. S., 160.

2. Employer and Employee—Master and Servant—Evidence—Safe Place to Work—Appeal and Error—Objections and Exceptions.

The requirement that an employer furnish his employee a reasonably safe place and reasonably safe appliances to perform dangerous services in the course of his employment, is not confined to the rule that the employer furnish him with appliances that are known, approved and in general use, and when the evidence is competent on the general duty of the employer in this respect, its admission will not be held for error, when exception is broadly made without particularizing or separating the objectionable part.

3. Evidence—Witnesses—Impeachment—Corroboration.

Where a witness has testified in his direct examination to competent substantive evidence, and his statement has been impeached or questioned on his cross-examination, it is competent for him to testify on his redirect examination to matters in corroboration of his former testimony that would not otherwise have been admissible; and where the plaintiff, in his action to recover for the wrongful death of his intestate, has testified to his physical condition competent upon the issue of damages, he may testify, on his redirect examination, after the cross-examination has sought to impeach this statement, that his intestate had been accepted and had served in the United States Army four or five months, when confined to the personal knowledge of the witness of the fact.

4. Pleadings—Evidence—Principal and Agent — Negligence — Vice-Principal.

In an action to recover for the wrongful death of plaintiff's intestate involving the question of the negligence of the defendant's vice-principal, it is not required that the complaint allege that the vice-principal was absent at the time of the injury, for the plaintiff to introduce evidence of this fact, and that another was acting in this capacity in his absence.

5. Evidence—Negligence—Res Ipsa Loquitur—Burden of Proof—Contributory Negligence—Instructions—Employer and Employee—Master and Servant—Fellow Servants.

Where there is evidence tending to show that the death of the plaintiff's intestate was caused in the course of his employment by the falling of a derrick the defendant had furnished him to perform his duties, this

may be considered by the jury as a circumstance from which they may infer defendant's actionable negligence in furnishing a defective or insufficient or insecure appliance, under the doctrine of *res ipsa loquitur*, the burden of proof remaining on the plaintiff, and the correctness of an instruction to that effect is not necessarily impaired by evidence tending to show negligence on the part of the intestate or of his fellow-servants.

APPEAL by defendants from *Long, J.*, at the January Special Term, 1924, of BURKE.

The defendants were engaged in putting up a building for a furniture manufacturing company in Morganton. The plaintiff's intestate was one of the employees. He and seven or eight other men used a derrick in raising and placing heavy pieces of timber in the walls of the building. They had raised and put in position between 75 and 100 pieces, and when the plaintiff's intestate was "riding" one of the timbers the derrick gave way, the timber fell and the intestate was thrown to the ground and injured. He died within a few hours. The plaintiff alleged that the defendants were negligent in the construction and operation of the derrick, that they had failed to secure or anchor it with cables or braces, and that the intestate's death was the proximate result of their negligence.

The defendants filed an answer, and at the trial the following verdict was returned:

1. Was plaintiff's intestate injured and killed by the negligence of the defendants as alleged in the complaint? A. Yes.

2. Did plaintiff's intestate, by his own negligence, contribute to the injury resulting in his death, as alleged in the answer? A. No.

3. Did plaintiff's intestate voluntarily assume the risk of receiving the injury resulting in his death, as alleged in the answer? A. No.

4. What damage, if any, has plaintiff sustained? A. $5,000.

Judgment for the plaintiff and appeal by the defendants.

Spainhour & Mull, S. J. Ervin, and S. J. Ervin, Jr., for plaintiff.
Avery & Ervin and W. A. Self for defendants.

ADAMS, J. The plaintiff offered in evidence the intestate's dying declarations as to the cause of his injury. Upon objection by the defendants, the judge granted their counsel a preliminary examination on this point, and in response the witness said: "He (the intestate) told me he could not get well; said a block had done it; said he could not live; told me what to do with his wife and things; said it had killed him; for me to attend to his wife and look after her, and what he had. He asked me then about these other boys, and how many of them were killed. At the time he said he could not get well Dr. Phifer was in

the house—in and out—when he was talking. I do not know if he was near enough to hear what he said—he was out and in—going around there. I could not tell you who was in. We were in a room this way, in the hospital. I don't know if anybody else heard his dying declaration; I could not tell you."

The following evidence was then admitted, and the defendants excepted: "He said the block and chain had hit him here (indicating); said this is what killed me—the block and chain hit him. After he told me he could not get well, he told how the accident occurred. I asked him. He told me when the derrick fell—when he realized it was falling—he said his foreman was jumping—all jumping off; and said, 'That was the last I saw of them.' I said, 'Mr. Abee was not there,' and he said, 'Mr. Hauser was the man looking after it when Mr. Abee was not there.' I said, 'I have not heard of it yet; I don't know who was hurt.' He turned his head over from me. At the time the derrick fell, he said they were lifting a piece of timber—him and the foreman was together; then spoke that Mr. Hauser was the man."

At the session of 1919 the Legislature amended section 59 of the Revisal (C. S., 160) by adding thereto the following paragraph: "In all actions brought under this section, the dying declarations of the deceased as to the cause of his death shall be admissible in evidence, in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence." Public Laws 1919, ch. 29.

In prosecutions for homicide, the declarations of the deceased, voluntarily made while *in extremis,* under a sense of impending death, concerning the act of killing, and the facts and circumstances forming a part of the *res gestæ* are admissible, where the deceased would be a competent witness if living. As in homicide, the declarations must be restricted to the act of killing and the attendant circumstances; so, in an action to recover damages for wrongful death, the declarations of the deceased are restricted by the terms of the statute to the cause of the death. *S. v. Shelton,* 47 N. C., 360; *S. v. Mills,* 91 N. C., 594; *S. v. Jefferson,* 125 N. C., 712; *S. v. Teachey,* 138 N. C., 587; *S. v. Bohanon,* 142 N. C., 695; *S. v. Hall,* 183 N. C., 806; *Tatham v. Mfg. Co.,* 180 N. C., 627; *Williams v. R. R.,* 182 N. C., 267, 273.

The defendants excepted on the ground that this principle was ignored. They say the declarations were not restricted to the circumstances attendant upon the injury. The reference to Hauser, it will be noted, was a part of the intestate's description of the surroundings under which the injury occurred—a part of the *res gestæ.* The language was this: "At the time the derrick fell, he said they were lifting a piece of timber—him and the foreman was together; then spoke that Mr. Hauser was the

man." Moreover, there was no exception to the specific declaration, "Hauser was the man looking after it when Mr. Abee was not there." Such exception was essential, for a general exception to the admission of evidence will not be considered unless all the evidence objected to is incompetent. *Barnhardt v. Smith,* 86 N. C., 479; *Smiley v. Pearce,* 98 N. C., 185; *Rollins v. Wicker,* 154 N. C., 559, 563; *Phillips v. Land Co.,* 174 N. C., 542.

Exception was taken to the plaintiff's testimony that he had seen a thousand derricks, and that all, except the one used by the intestate, were equipped with guy wires; and to the testimony of Horace Moses, that the derrick, before the injury, "was shaky—it shook—shook all it could"; that "all other derricks he had seen were different, in that they had guy wires, and that this one did not conform to the rule"; and that "Mr. Dellinger says to me, 'Do you want a job?' I said, 'Yes, sir.' Mr. Hauser says, 'I suppose you can get a job if you want it.' I says, 'I don't want a job here; this is dangerous; I hain't ready to die yet.'"

The defendants do not intend, by this exception, to assail the doctrine that it was the duty of the defendants to exercise due care to provide for the intestate reasonably safe appliances with which to do his work, but they say the evidence was not competent upon the question whether they had neglected to perform their duty in this respect. They contend that the apparatus used for hoisting the timber was not such a derrick as is usually supported by guy wires, but an appliance of a different character, and that the admission of the evidence implied its unsafe condition because it was not held in position by cables or braces.

As we understand the record, the evidence was admitted on another theory. In the complaint the appliance was described as a derrick, and the plaintiff contended that even if it fell short of the technical definition, it was spoken of and treated as a derrick during the trial, and, as constructed, was not such as was approved and in general use. In *Ainsley v. Lumber Co.,* 165 N. C., 122, the Court approved the doctrine that the employer's duty with respect to providing for his employees such machinery, implements and appliances as are known, approved and in general use, while peremptory in its terms and effect, is in addition to the more general one of supplying such as are reasonably safe and suitable, and that both are included in the general obligation resting on the employer to exercise the care of a prudent man in looking after the safety of his employees. The use of machinery and appliances which are approved and in general use does not necessarily acquit the master of liability. There are other respects in which he must exercise due care. *Hornthal v. R. R.,* 167 N. C., 627; *Dunn v. Lumber Co.,* 172 N. C., 129; *Cook v. Mfg. Co.,* 182 N. C., 205; *Gaither v. Clement,* 183 N. C., 451. In this view, the evidence was properly admitted. If the

derrick was not a complicated piece of machinery, its operation involved elements of danger which placed it outside the category of simple tools.

On his cross-examination the plaintiff testified that the intestate, at the time of his injury, "was a strong, healthy young fellow"; and, on the redirect examination, that after being accepted by the board he served in the army four or five months. To the latter evidence the defendants excepted.

It is true that the trial judge should exclude evidence which is foreign to the issues, or insufficient for legitimate use, or illegal as tending only to excite the passion, arouse the prejudice, awaken the sympathy, or warp the judgment of the jury (*Shepherd v. Lumber Co.,* 166 N. C., 130); but here the evidence was confined to the personal knowledge of the witness and was ostensibly admitted, after cross-examination, in explanation and corroboration of his former testimony. In this we see no reversible error. The same principle applies, in our opinion, to the admission of the plaintiff's affidavit and the clerk's order for the examination before the trial of the defendant Abee. The plaintiff testified, on his cross-examination, that he had tried to ascertain from Abee the men who were at work with the intestate when he was injured, and that Abee at first promised to give him their names, and afterwards refused to do so, and that the examination of the defendant was necessary. The judge admitted the affidavit and order, only so far as they tended to corroborate the previous statements of the witness, and was careful to restrict the evidence to this purpose. The affidavit was not read in the presence of the jury, and it was referred to in the argument only to show that an affidavit and order were necessary to get the desired information. The defendants contend that they did not object to proof that the witness had made the affidavit, or attempt to impeach him in this particular, and that the evidence for this reason was not admissible in corroboration. In several respects, however, the witness was impeached. Indeed, this was no doubt the object of the cross-examination. In *S. v. Bethea,* 186 N. C., 22, it was said: "This Court has often held that whenever a witness has given evidence in a trial, and his credibility is impugned, whether by proof of bad character or by his contradictory statements, or by testimony contradicting him, or by cross-examination tending to impeach his veracity or memory, or by his relationship to the cause or to the party for whom he testified, it is permissible to corroborate and support his credibility by evidence tending to restore confidence in his veracity and in the truthfulness of his testimony. Such corroborating evidence may include previous statements, whether near or remote, and whether made pending the controversy or *ante litem motam. Johnson v. Patterson,* 9 N. C., 183; *S. v. George,* 30 N. C., 324; *Hoke v. Fleming,* 32 N. C., 263; *March v. Harrell,* 46

N. C., 329; *Jones v. Jones,* 80 N. C., 247; *Roberts v. Roberts,* 82 N. C., 30; *Davis v. Council,* 92 N. C., 726; *S. v. Brabham,* 108 N. C., 793; *S. v. Exum,* 138 N. C., 600; *Cuthbertson v. Austin,* 152 N. C., 336; *Bowman v. Blankenship,* 165 N. C., 519; *Belk v. Belk,* 175 N. C., 69; *S. v. Krout,* 183 N. C., 804."

Exception was noted to the testimony of Horace Moses that Hauser gave directions or instructions when Abee was absent; that he acted as Abee's *alter ego.* True, there is no allegation in the complaint that Hauser was vice-principal of the defendants; but there was other evidence, not excepted to, tending to show that Abee was not present when the injury occurred, and that in his absence Hauser was in control. There was also evidence that Hauser temporarily directed the work. To require the plaintiff to set out in the complaint the name of every one placed in authority during the foreman's temporary absence would impose a difficult, if not insuperable, task. Whether Hauser was serving in the capacity of foreman while Abee was absent was a question of fact, and was properly submitted to the jury, under the circumstances disclosed by the record.

His Honor gave this instruction: "The fact that the derrick fell and injured and killed the intestate, if you find that it did fall and injure and kill him, is a circumstance from which you have a right to find or infer that the derrick was in some way defective or insufficient or insecure, and that its fall was due to or caused by some negligence on the part of the defendants."

The defendants excepted, on the ground that the instruction not only withheld from the jury's consideration any evidence of negligence on the part of the plaintiff's intestate or of a fellow-servant, but declared, in effect, that "the thing speaks for itself." They now challenge the application of the doctrine of *res ipsa loquitur,* and contend that it obtains only where injury is sustained under such circumstances as logically tend to establish negligence.

In *Saunders v. R. R.,* 185 N. C., 289, the doctrine is discussed and the distinction drawn between cases in which the machinery or appliance is under the management of the employer and those in which it is not. Several cases are there cited, among them *Womble v. Grocery Co.,* 135 N. C., 474, in which the falling of an elevator was held to be evidence of negligence, the Court applying the principle stated in *Ellis v. R. R.,* 24 N. C., 138, that, "Although the burden is on the plaintiff to show negligence causing damage, when he shows damage resulting from the act of the defendant, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence." Undoubtedly, the falling of the elevator was evidence of negligence in its construction, maintenance or operation. The jury

were permitted to determine whether the defendants were negligent and whether their negligence was the proximate cause of the intestate's injury and death. The correctness of the instruction was in no way impaired by evidence tending to show negligence on the part of the intestate or his fellow-servants.

We have given careful attention to the remaining exceptions, and have been unable to find any error which entitles the defendants to a new trial.

No error.

FEDERAL LAND BANK OF COLUMBIA ET AL. V. ATLAS ASSURANCE COMPANY.

(Filed 22 January, 1924.)

APPEAL by plaintiffs from *Lane, J.*, at June Term, 1923, of BUNCOMBE.

Civil action, to recover for loss by fire under a policy of insurance issued by the defendant.

From a judgment of nonsuit, entered at the close of all the evidence, the plaintiffs appeal.

Mark W. Brown for plaintiffs.
Tillett & Guthrie for defendant.

PER CURIAM. Reversed and remanded, on authority of *Federal Land Bank of Columbia et al. v. Globe and Rutgers Fire Insurance Company, ante,* 97, this day decided.

Reversed.

R. L. JENNETTE ET UX. V. T. J. MANN ET AL.

(Filed 20 February, 1924.)

APPEAL by defendants from *Allen, J.*, at September Special Term, 1923, of HYDE.

Civil action to recover damages for an alleged negligent injury to plaintiffs' crops and lands occasioned by defendants' failure to keep in proper condition their portion of a common canal constructed for the drainage of the lands of both plaintiffs and defendants, adjacent landowners.

From a verdict and judgment in favor of plaintiffs, defendants appeal.

Walter L. Spencer for plaintiffs.
S. S. Mann, Thos. S. Long, and Daniel & Carter for defendants.

PER CURIAM. A careful perusal of the present record leaves us with the impression that the case has been tried substantially in accordance with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The verdict and judgment will be upheld.

No error.

B. D. JOHNSON v. J. F. MURPHY ET AL.

(Filed 12 March, 1924.)

APPEAL by defendants from *Grady, J.*, at August Term, 1923, of DUPLIN.

George R. Ward for plaintiff.
Oscar B. Turner for defendants.

PER CURIAM. For the reasons given in *Johnson v. Murphy et al., ante,* 384, the judgment is reversed and the cause remanded for additional facts.

Reversed and remanded.

J. B. GILLAM v. THE TOWN OF WINDSOR.

(Filed 12 March, 1924.)

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1923, of BERTIE.

Civil action in trespass and to establish plaintiff's ownership to a lot of land located in the town of Windsor. The jury returned the following verdict:

"1. Is plaintiff owner of the land described in the complaint? Answer: Yes.

"2. Have defendants an easement over the lands described in complaint? Answer: Yes.

"3. Have defendants trespassed upon the lands, as alleged in the complaint? Answer:....."

Judgment on the verdict in favor of the defendant, from which plaintiff appeals.

R. C. Bridger, Harry W. Stubbs, Alex Lassiter, and Aydlett & Simpson for plaintiff.

Gillam & Davenport and Winston & Matthews for defendant.

PER CURIAM. The only material exceptions presented on the appeal are those directed to portions of the charge. A careful perusal of the record confirms us in the belief that the cause has been tried in substantial accord with the decisions relating to the question involved. The case presents no new or novel point of law which would seem to warrant an extended discussion, or which we apprehend would be helpful or beneficial to the profession. We have discovered nothing which would entitle the plaintiff to a new trial. Hence the verdict and judgment entered below will be upheld.

No error.

F. G. EVERETT v. R. M. WILLIAMS AND THE WILLIAMS COMPANY.

(Filed 26 March, 1924.)

APPEAL by defendants from *Cranmer, J.*, at February Term, 1923, of ROBESON.

Civil action, *indebitatus assumpsit*, tried upon the following issue:

"In what amount, if any, are the defendants indebted to the plaintiff? Answer: $393 and interest."

Judgment on the verdict for plaintiff. Defendants appeal, assigning errors.

McLean, Varser, McLean & Stacy for plaintiff.

McKinnon, Fuller & McKinnon for defendants.

PER CURIAM. A careful perusal of the present record leaves us with the impression that the case has been tried substantially in agreement with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The verdict and judgment will be upheld.

No error.

G. M. BEAM, ADMINISTRATOR HERBERT L. JONES, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 26 March, 1924.)

APPEAL by plaintiff from *Calvert, J.*, at August Term, 1923, of FRANKLIN.

Civil action to recover damages for an alleged negligent killing of plaintiff's intestate.

Upon denial of liability and issues joined, there was a verdict and judgment for the defendant. Plaintiff appeals, assigning errors.

Jas. H. Pou, W. M. Person, G. M. Beam, and W. H. Yarborough for plaintiff.

Murray Allen and B. T. Holden for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accord with the settled principles of law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The case presents no new question.

No error.

STATE v. NEAL DISON.

(Filed 9 April, 1924.)

APPEAL by defendant from *Lane, J.*, at October Term, 1923, of SURRY.

Criminal prosecution, tried upon an indictment charging defendant with an assault with intent to commit rape.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Folger for defendant.

PER CURIAM. The only exception presented on the record is the one directed to the refusal of the trial court to grant the defendant's motion for dismissal of the action or for judgment as of nonsuit, made under C. S., 4643, after the State had produced its evidence and rested its case.

Viewing the evidence in the light most favorable to the State, the accepted position on a motion of this kind, we think the trial court was justified in submitting the case to the jury, and that the verdict is supported by the evidence.

No benefit would be derived from detailing the testimony, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is. *S. v. Williams,* 186 N. C., 627; *S. v. Massey,* 86 N. C., 658.

No error.

SAMUEL H. SHEARER & SON v. J. F. HERRING.

(Filed 9 April, 1924.)

MOTION to set aside judgment for irregularity and for surprise and excusable neglect, heard before *Cranmer, J.,* at September Term, 1923, of PENDER.

The court, on affidavits submitted, made an adequate finding of fact, and, being of opinion that the judgment considered had been entered contrary to the course and practice of the court, adjudged that same be set aside for irregularity, and defendant excepted and appealed.

J. T. Bland for plaintiff.

Stevens, Beasley & Stevens, and Weeks & Cox for defendant.

PER CURIAM. The facts in evidence and the findings of his Honor are in full support of the order setting aside the judgment for irregularity. There are also facts in evidence tending to uphold his Honor's present judgment on the ground of surprise and excusable neglect. On careful perusal of the record, we are of opinion that there is no error, and the judgment of the lower court is

Affirmed.

HAMMOND & BELL v. E. J. GEROCK.

(Filed 9 April, 1924.)

APPEAL by plaintiff from *Kerr, J.,* at October Term, 1923, of HERTFORD.

Civil action in contract, to recover for goods alleged to have been sold and delivered.

From a verdict and judgment in favor of defendant, plaintiff appeals.

R. C. Bridger for plaintiff.
Walter R. Johnson for defendant.

PER CURIAM. Upon sufficient evidence, the jury have found, in answer to an issue submitted to them, that the goods shipped by plaintiff did not come up to sample and were not of the quality of goods sold by plaintiff's agent to the defendant. No valid contract of sale having been made between the parties, and the goods having been returned to the plaintiff, recovery was properly denied. A careful perusal of the record convinces us that the case has been tried substantially in agreement with the law bearing on the subject, and no ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The verdict and judgment will be upheld.

No error.

B. E. PARHAM v. W. A. ADAMS COMPANY.

(Filed 9 April, 1924.)

APPEAL by defendant from *Devin, J.*, at October Term, 1923, of GRANVILLE.

Civil action, to recover damages for an alleged negligent injury to plaintiff's tobacco.

From a verdict and judgment in favor of plaintiff, defendant appeals, assigning errors.

Hicks & Stem for plaintiff.
Parham & Lassiter and D. G. Brummitt for defendant.

PER CURIAM. Upon controverted issues of fact, the jury has determined the case in favor of plaintiff. A careful perusal of the record convinces us that the case has been tried substantially in agreement with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. There is nothing on the record which entitles the defendant to a new trial. The verdict and judgment will be upheld.

No error.

HATTIE B. HORNER, ADMINISTRATRIX OF J. T. HORNER, v. THE HOME INSURANCE COMPANY OF NEW YORK.

(Filed 16 April, 1924.)

APPEAL by defendant from *Sinclair, J.*, at October Term, 1923, of CUMBERLAND.

Civil action tried upon the following issues:

"1. Was the Grant automobile described in defendant's policy No. Au-1128 stolen during the currency of said policy, as alleged in the complaint? A. Yes.

"2. Was plaintiff's intestate the owner of the Grant automobile described in the complaint at the time it disappeared from his garage? A. Yes.

"3. Is the car now in the possession of J. A. McGougan, Raeford, N. C., the same car as the one referred to in the complaint? A. Yes.

"4. What sum, if any, is the plaintiff entitled to recover of the defendant on said policy on account of said car having been stolen? A. $1,000 with interest from May, 1922, until paid."

Judgment on the verdict for plaintiff. Defendant appeals.

W. C. Downing and Nimocks & Nimocks for plaintiff.

Cook & Cook and S. C. McPhail for defendant.

PER CURIAM. Several serious exceptions are entered on the record, but a careful perusal of the whole case confirms us in the belief that no violence has been done to any legal principle in the trial of the cause. Hence the judgment will be upheld. The appeal presents no new or novel point of law which would seem to warrant an extended discussion, or which we apprehend would be helpful or beneficial to the profession. We have discovered no legal or reversible error on the part of the trial court.

No error.

STATE v. DOCKERY BROOKS AND WILL FRED LOCKLEAR.

(Filed 23 April, 1924.)

APPEAL by defendant Brooks from *Long, J.*, at October Special Term, 1923, of ROBESON.

Criminal prosecution wherein Will Fred Locklear was indicated for an assault and battery with a deadly weapon, to wit, a shotgun, upon one Herbert Lowry, with intent to kill, and Dockery Brooks was charged in the same bill of indictment with aiding and abetting in the commis-

sion of said crime; and also the said Locklear and Brooks were charged in another bill of indictment with resisting an officer while attempting to discharge the duties of his office.

The verdict of the jury was "Guilty" under both indictments. From the judgment pronounced thereon, the defendant Dockery Brooks appeals.

Attorney-General Manning, Assistant Attorney-General Nash, and Varser, McLean & Stacy for the State.

E. J. & L. L. Britt and Smith & McQueen for defendant Dockery Brooks.

PER CURIAM. We are convinced from a careful examination of the record that the instant case has been tried in substantial compliance with the law bearing on the subject, and no ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for reversible or prejudicial error. The validity of the trial must be upheld.

No error.

R. A. MARSHALL v. MECKLENBURG HIGHWAY COMMISSION.

(Filed 30 April, 1924.)

APPEAL by defendant from *Stack, J.*, at February Term, 1924, of MECKLENBURG.

Civil action, to recover damages for the relocating of a public road through the lands of the plaintiff.

From a verdict and judgment in favor of plaintiff the defendant appeals, assigning errors.

No counsel contra.

J. L. DeLaney for defendant.

PER CURIAM. Defendant's chief exceptions, as stressed on the argument and in its brief, are those directed to portions of the court's charge on the measure of damages. Construing the charge as a whole, as we are required to do, we do not think it is susceptible to any serious defect. The case seems to have been tried in substantial compliance with the law bearing on the subject, and no ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The validity of the proceeding will be upheld.

No error.

RUTHERFORD HOSPITAL v. THE FLORENCE MILLS.

(Filed 21 May, 1924.)

APPEAL by defendant from *Ray, J.*, at August Term, 1923, of RUTHERFORD.

Civil action, to recover for medical, surgical and professional services rendered one of defendant's employees at the instance of defendant's superintendent.

From a verdict and judgment in favor of plaintiff the defendant appeals.

Solomon Gallert for plaintiff.
Quinn, Hamrick & Harris for defendant.

PER CURIAM. Defendant relies chiefly upon its demurrer to the evidence and motion for judgment as of nonsuit. Viewing the testimony in the most favorable light for the plaintiff, the accepted position on a motion of this kind, we think the trial court was justified in submitting the case to the jury, and that the verdict is warranted by the evidence. A careful perusal of the entire record leaves us with the impression that the cause has been tried substantially in agreement with the law bearing on the subject, and that the verdict and judgment should be upheld. *Miller v. Cornell, ante,* 550.

No error.

CITIZENS HOTEL COMPANY v. E. D. LATTA, JR.

(Filed 31 May, 1924.)

APPEAL by defendant from *Stack, J.*, at February Term, 1924, of MECKLENBURG.

Civil action, tried upon the following issues:

"1. Did the defendant execute the subscription contract introduced in evidence as plaintiff's Exhibit 1? A. Yes (by consent).

"2. Was the condition of the subscription contract that subscriptions for $750,000 shall be secured within six months from 1 April, 1920, complied with? A. Yes.

"3. Was the condition of the said subscription contract that a valid proposal for a contract to lease the proposed hotel shall be received from a responsible party within 12 months from 1 April, 1920, the rent to be not less than 6 per cent return on the investment and the lessee to pay all taxes, insurance and upkeep, complied with? A. Yes.

"4. In what amount, if any, is the defendant indebted to the plaintiff? A. $100 and interest from 10 January, 1922."

From a judgment on the verdict in favor of plaintiff the defendant appeals, assigning errors.

Pharr, Bell & Sparrow and Thaddeus A. Adams for plaintiff.
Cansler & Cansler and Tillett & Guthrie for defendant.

PER CURIAM. The case of *Hotel Co. v. Latta,* 186 N. C., 709, is, in many respects, similar to the one at bar. The only material difference being that the present defendant was not one of the original incorporators of the plaintiff company, nor was he one of the trustees named in the uniform stock-subscription contract; but he did sign one of these contracts, and, under the verdict rendered, we think he is bound by his subscription. It would only be a work of supererogation to restate the settled principles of law under which the instant case is clearly brought by the jury's verdict. We have given the record a very careful examination. Considering it in the light of presumption against error, the accepted position on all appeals (*In re Smith's Will,* 163 N. C., 464), we think the exceptions should be resolved in favor of the validity of the trial.

No benefit would be derived from a discussion, *seriatim,* of the several assignments of error, as they present no new or novel point of law not heretofore settled by our decisions.

From our investigation of the record we are constrained to believe that the verdict and judgment should be upheld. It is so ordered.

No error.

CLARKSON, J., did not sit.

GILLILAND STIKELEATHER ET AL. v. ASHEVILLE PARK COMPANY.

(Filed 31 May, 1924.)

APPEAL by plaintiff from *McElroy, J.,* at September Term, 1923, of BUNCOMBE.

Martin, Rollins & Wright and Marcus Erwin for plaintiffs.
Mark W. Brown for defendant.

PER CURIAM. The plaintiffs brought suit to recover certain commissions alleged to be due for services rendered the defendant in the sale of land. At the close of the evidence the judge dismissed the action

as in case of nonsuit, and the plaintiff appealed. The evidence covers more than sixty printed pages and a minute statement of the portion most favorable to the plaintiff need not be made. It is sufficient to say that while we express no opinion as to the weight of the evidence, we think there was more than a scintilla to sustain the plaintiff's contention. The judgment is

Reversed.

J. L. OWEN v. SUNCREST LUMBER COMPANY ET AL.

(Filed 31 May, 1924.)

APPEAL by defendant from *McElroy, J.*, at February Term, 1924, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered by them in favor of the plaintiff. Judgment on the verdict. Defendant appeals.

Smathers & Robinson and Morgan & Ward for plaintiff.
Alley & Alley and Merrimon, Adams & Johnston for defendant.

PER CURIAM. A careful perusal of the record fails to disclose any reversible or prejudicial error committed on the trial. The case was before us at the Spring Term, 1923, 185 N. C., 612, when a new trial was granted for error in the charge.

We have found no error on the present record, hence the verdict and judgment will be upheld.

No error.

GEORGE MOODY v. KITCHIN LUMBER COMPANY.

(Filed 31 May, 1924.)

APPEAL by defendant from *McElroy, J.*, at March Term, 1924, of GRAHAM.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered by them in favor of the plaintiff. From the judgment rendered thereon the defendant appeals, assigning errors.

Moody & Moody for plaintiff.
R. L. Phillips for defendant.

PER CURIAM. The exception chiefly relied upon by the defendant, as stressed on the argument and in its brief, is the one directed to the refusal of the court to grant its motion for judgment as of nonsuit, made first at the close of the plaintiff's evidence, and renewed at the close of all the evidence. C. S., 567. A careful perusal of the record leaves us with the impression that the case was properly submitted to the jury.

No benefit would be derived from detailing the testimony of the several witnesses, as the only question presented is whether, in its entirety, it is sufficient to carry the case to the jury, and we think it is.

No error.

W. P. GRANT v. TALLASSEE POWER COMPANY.

(Filed 31 May, 1924.)

APPEAL by defendant from *Bryson, J.*, at September Term, 1923, of GRAHAM.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered by them in favor of the plaintiff. From the judgment rendered on the verdict defendant appeals, assigning errors.

J. N. Moody, T. A. Morphew, and T. M. Jenkins for plaintiff.
R. L. Phillips and S. W. Black for defendant.

PER CURIAM. The single exception presented on the appeal is the one directed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made first at the close of the plaintiff's evidence, and renewed at the close of all the evidence. C. S., 567. Viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion of this kind, we think the trial court was justified in submitting the case to the jury, and that the verdict is warranted by the evidence.

No benefit would be derived from setting out in detail the testimony of the several witnesses, as the only question before us is whether it is sufficient, taken in its entirety, to carry the case to the jury, and we think it is.

No error.

G. P. CONNOR v. SUNCREST LUMBER COMPANY ET AL.

(Filed 31 May, 1924.)

APPEAL by defendant from *McElroy, J.*, at February Term, 1924, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered by them in favor of the plaintiff. Judgment on the verdict. Defendant appeals.

Morgan & Ward for plaintiff.

Martin, Rollins & Wright, Alley & Alley, and Merrimon, Adams & Johnston for defendant.

PER CURIAM. Upon warmly contested issues of fact, the jury returned a verdict in favor of the plaintiff. We have found no sufficient reason for disturbing the result of the trial. Hence the verdict and judgment will be upheld.

The record presents no new or novel point of law not heretofore settled by our decisions, and it would only be a work of supererogation, or "threshing over old straw," to discuss the exceptions *seriatim*. No error has been made to appear.

No error.

A. B. MCCARTER v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY AND THE SOUTHERN RAILWAY COMPANY.

(Filed 31 May, 1924.)

Appeal and Error—Precedent—Divided Court.

When the Supreme Court is equally divided on appeal, the judgment of the lower court will be affirmed without establishing a precedent.

APPEAL by plaintiff from *Stack, J.*, at March Term, 1924, of GASTON.

Civil action to recover damages for an alleged negligent injury sustained by the plaintiff while in the discharge of his duties as an employee of the defendant Southern Railway Company.

From a judgment of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals.

Mangum & Denny for plaintiff.

Oscar F. Mason and George B. Mason for defendant.

STACY, J. The Court being evenly divided in opinion—the death of *Chief Justice Clark* leaving only four members present—the judgment of the lower court is affirmed, and stands as the decision in this case without becoming a precedent. *Miller v. Bank,* 176 N. C., 152; *Durham v. R. R.,* 113 N. C., 240.

Affirmed.

BERLIN JENKINS v. SUNCREST LUMBER COMPANY ET AL.

(Filed 31 May, 1924.)

Appeal and Error—Precedent—Divided Court.

The judgment of the lower court will be affirmed without establishing a precedent, when the Supreme Court is equally divided as to the decision on appeal.

APPEAL by defendant from *McElroy, J.,* at January Term, 1924, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered by them in favor of the plaintiff. From a judgment on the verdict defendant appeals, assigning errors.

Swain Elias, Grover C. Davis, Zeb F. Curtis, William Tucker Hannah, and W. J. Hannah for plaintiff.

Morgan & Ward and Alley & Alley for defendant.

STACY, J. This case comes from the Twentieth Judicial District and was called for argument last week after the death of *Chief Justice Clark.* Two members of the Court think that a new trial should be awarded, while the other two held a contrary view. Thus the Court is evenly divided in opinion. Following the uniform practice of appellate courts in such cases, the judgment of the lower court is affirmed and stands, not as a precedent, but as the decision in this case. *Durham v. R. R.,* 113 N. C., 240, and cases there cited.

No error.

CASES FILED WITHOUT WRITTEN OPINIONS

Auto Co. v. McCandless. (549)

Bank v. Crotts. (359)

Blue v. Gardner.

Continental Guaranty Corp. v. Powell. (293)

Dunn v. Taylor.

Fagan v. Fagan.

Hackett v. Townsend. (303)

In re Will of Willett. (93)

Palmer v. Marble Co.

Powell v. Williamson. (221)

Pruitt v. Felder.

Reidsville v. Lawing.

Rosenthal v. Epstein. (289)

Shelton v. Oil Co. (362)

S. v. Baldwin. (324)

S. v. Barrett. (418)

S. v. McCoy. (417)

S. v. Wilkerson. (323)

Thompson Co. v. Pope. (89)

Worthington v. Kinsaul. (164)

ANNOUNCEMENT OF DEATH

OF

CHIEF JUSTICE WALTER CLARK

CHIEF JUSTICE WALTER CLARK died at 8:30 a. m. on Monday, 19 May, 1924. On that day the Associate Justices of the Supreme Court made the following expression:

CHIEF JUSTICE WALTER CLARK'S associates on the bench have been profoundly affected by his sudden and unexpected death. His passing is a distinct loss to our State and to her people. The personal feeling which has come to each member of the Court is one of unfeigned and heartfelt sorrow. He was devoted to his work and always pursued it with great industry and energy. We shall miss his never-failing courtesy and the wisdom of his counsel. We desire to express our sympathy for his bereaved family and the people of North Carolina, whom he has ever served with conscientious devotion and untiring zeal.

On Tuesday, 20 May, 1924, the Court assembled at 10 a. m., and the Attorney-General formally announced to the Court the death of its Chief Justice, as follows:

May it please your Honors:

It is with profound sorrow that I announce to this Court the sudden death of its great Chief Justice. His great work is done; the tireless brain that seemed never to know fatigue labors no more. He has been called to his fathers, and as a mark of respect to his memory I move that this Court do now adjourn.

Associate Justice Hoke made the following expression in reply to the announcement of the Attorney-General and to his motion that the Court adjourn:

The Court has heard the announcement of the Attorney-General in profound appreciation of the great loss that has come to the State and its people in the death of their Chief Justice, and with a deep sense of personal sorrow.

Truly, my brethren, a great public servant has fallen—fallen as he would have wished to go, and as he ever was, at his post of duty.

In recognition of his eminent worth, and as a mark of respect to his memory, the Court stands adjourned until Wednesday morning at 10 o'clock, and will attend the funeral in a body.

INDEX.

ABANDONMENT.

Abandonment — Husband and Wife — Criminal Law — Limitation of Actions—Statutes—Appeal and Error—Instructions.—For the conviction of a misdemeanor prescribed for the abandonment by the husband of his wife and children (C. S., 4173, 4448, 4449), it is required by C. S., 4512, that presentment shall be made or found by the grand jury within two years after the commission of the offense, and a conviction of the husband otherwise cannot be sustained; and an instruction of the trial judge extending the time for a period caused by delays in the investigation in the court of the justice of the peace, should the warrant have been issued in the time prescribed by the statute, is reversible error, such being insufficient to repel the bar of the statute. *S. v. Hedden*, 803.

ABUTTING OWNERS. See Municipal Corporations, 7.

ACCEPTANCE. See Easements, 3.

ACCIDENT. See Principal and Agent, 4; Criminal Law, 19.

ACCOMPLICE. See Evidence, 36.

ACKNOWLEDGMENT. See Deeds and Conveyances, 14.

ACTIONS. See Injunctions, 1; Insurance, 2; Railroads, 6; Carriers, 4, 5, 6; Pleadings, 5, 11; Liens, 3, 5; Banks and Banking, 15, 16; Judgments, 12; Gaming, 1; Evidence, 41; Husband and Wife, 1; Negligence, 2.

1. *Actions — Bills and Notes — Payment — Burden of Proof.*— Where the plaintiff produces in evidence the defendant's note, uncanceled, upon which suit was brought, the burden is on the defendant to show that he had paid it, in order to establish this as a defense. *Bank v. Knox*, 565.

2. *Actions — Residence —Venue—Parent and Child—Infants—Illegitimate Children—Statutes.*—The residence of an unemancipated illegitimate child is, by the construction of law, that of the mother, and the venue of his action by his next friend on a contract made by his mother and father for his benefit is the county of the residence of his mother, though the child may be living with his grandparents at the time in a different county. C. S., 469. *Thayer v. Thayer*, 573.

3. *Actions—Suits—Equity—Cloud on Title—Statutes.*—C. S., 1473, giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. *Bank v. Sumner*, 762.

4. *Actions — Suits — Creditor's Bill—Insolvent Corporations—Receivers—Parties.*—While the creditors of an insolvent corporation may, under certain circumstances, maintain a suit in equity in the nature of a creditor's bill, to establish their debts and compel a proper application of the corporation's assets to the payment of their claims, this

ACTIONS—*Continued.*

right of action is primarily in a receiver, when one has been appointed, and he alone is the proper party to prosecute the action, unless cause is shown to the contrary. *Bickley v. Green*, 772.

5. *Same—Misjoinder—Dismissal.*—A creditor's bill against an insolvent corporation, to compel the payment of unpaid balance of subscriptions to its capital stock; fraud in the taking over and misappropriation of its funds in the management of its affairs by certain of the defendants alleged to be in control, claiming to be the owners, suits by certain individual creditors against still other defendants on separate demands or claims against the latter, is a misjoinder of parties and causes of action, and is properly dismissed in the Superior Court. *Ibid.*

ACTS. See Evidence, 35.

ADMINISTRATION. See Dower, 4.

ADMIRALTY.

1. *Admiralty—Negligence — Collisions—Pilots—Contributory Negligence—Evidence—Directing Verdict—Statutes—Appeal and Error.*—Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of C. S., 6985; and, under the Federal statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. *Harris v. Slater*, 163.

2. *Admiralty — Negligence — Fires — Evidence—Questions for Jury—Vessels—Federal Statutes.*—Under the provisions of section 4282, U. S. Revised Statutes, exempting the owner of a vessel from liability for loss of or damage to goods being transported, caused by fire occurring on board the vessel, unless so caused by the design or neglect of the owner, evidence is sufficient to take the case to the jury which tends to show that the motor power of the vessel was an imperfect gas engine, and the navigation of the boat in a difficult route was left to an incompetent and illiterate boy, who was alone on the boat and without aid in preventing the spread of the fire which destroyed the plaintiff's merchandise thereon. *Emory v. Gas Boat*, 167.

ADMISSIONS. See Judgment, 1; Injunctions, 9; Evidence, 31.

ADVANCEMENT. See Wills, 22.

ADVERSE POSSESSION. See Tenancy in Common, 1.

AFFIDAVIT. See Tenancy in Common, 7.

AGENCY. See Banks and Banking, 2, 8; Taxation, 8; Principal and Agent.

ALIBI. See Homicide, 4.

AMBIGUITIES. See Evidence, 6.

AMENDMENTS. See Pleadings, 1, 9; Removal of Causes, 9.

ANIMUS REVERTANDI. See Wills, 28.

ANSWER. See Pleadings, 3, 6, 8, 11, 12; Statute of Frauds, 1; Judgments, 7.

APPEAL. See Constitutional Laws, 4; Judgments, 13; Sales, 2; Estates, 5; Tenancy in Common, 8.

APPEAL AND ERROR. See Abandonment, 1; Courts, 3; Employer and Employee, 2, 4; Wills, 27; Limitation of Actions, 3; Jury, 2; Liens, 7; Pleadings, 19; Habeas Corpus, 2; Schools, 15; Evidence, 15, 22, 27, 29, 38, 39; Instructions, 1, 4, 5, 6, 7, 8; Intoxicating Liquors, 3; Juvenile Courts, 1; Contracts, 18, 21; Carriers, 1; Criminal Law, 4, 16, 20, 22; Deeds and Conveyances, 1, 2; Elections, 1; Homicide, 1, 6; Injunctions, 3, 8, 9; Insurance, 2; Railroads, 5, 8; Removal of Causes, 2; Admiralty, 1; Judgments, 1, 2, 4, 7, 15; New Trials, 1; Taxation, 9.

1. *Appeal and Error — Objections and Exceptions — Questions and Answers—Record.*—Exceptions to the exclusion of questions will not be considered on appeal unless the materiality of the expected answers is properly made to appear of record. *Barbee v. Davis*, 78.

2. *Appeal and Error—Injunctions—Prima Facie Case—Presumptions.*—The appellant from the refusal of the trial court to continue a restraining order to the hearing, at least when this is the main relief sought, must show by his evidence a *prima facie* case entitling him to the relief demanded. *Plott v. Comrs.*, 126.

3. *Appeal and Error — Instructions — Record—Presumptions—Burden to Show Error.*—The burden is on the appellant to establish substantial error; and where the charge of the court is not set up in its entirety in the record, an exception that it did not sufficiently cover a phase of the controversy arising upon the evidence is untenable, the presumption being to the contrary. *R. R. v. Nichols*, 154.

4. *Appeal and Error — Judgments—Defenses—Rehearings.*—Where a carrier does not take the proper steps to have a final judgment rendered against it in the State court reviewed in the United States court upon a defense set up in denial of its rights under the Federal law, and seeks to enjoin the enforcement of the judgment by execution in the State courts, it is, in effect, an endeavor to obtain a rehearing of the case by means of a second suit, which is not permissible. *R. R. v. Story*, 185.

5. *Appeal and Error — Objections and Exceptions — Presumptions — Verdict—Judgments—Trials.*—Where appellant has not excepted upon the trial to the court's ruling upon the evidence or to the issues submitted, or to the instructions given, but only to the judgment signed in accordance with the verdict, the Supreme Court on appeal will presume that the trial was free from error and only consider the correctness of the judgment in its relation to the verdict rendered. *Indemnity Co. v. Tanning Co.*, 190.

6. *Appeal and Error — Pleadings — Motions — Verdict Set Aside — Judgment—Premature Appeals—Dismissal.*—From the refusal of a motion for judgment upon the pleadings an appeal will not directly lie, and where the verdict has been set aside in the court's discretion, there is no judgment from which an appeal may be taken, and it will be dismissed in the Supreme Court as premature. *Pender v. Taylor*, 250.

APPEAL AND ERROR—*Continued.*

7. *Appeal and Error—Objections and Exceptions—Trials.*—An assignment of error on appeal for error alleged upon a different theory than that upon which the case was tried in the Superior Court will not be considered. *Clark v. Harris*, 251.

8. *Appeal and Error—Injunction—Equity—Findings of Fact—Conclusiveness of Findings.*—On appeal in matters of injunction involving the rights of an incorporated coöperative marketing association to receive and market the tobacco grown by its member, etc., the findings of fact by the Superior Court judge are not conclusive, and the Supreme Court will pass upon the evidence and determine the facts applicable to the relief sought. *Tobacco Association v. Patterson*, 252.

9. *Appeal and Error — Municipal Corporations — Cities and Towns—Condemnation of Lands—Nonsuit—Judgments — Fragmentary Appeal.*—No appeal to the Superior Court lies by the respondent in proceedings to condemn his lands by a city for street purposes until the town has affirmed the report of the commissioners appraising the value. Upon an appeal the city may take a voluntary nonsuit upon payment of costs where no counterclaim has been pleaded by the respondent and he has set up no equity in the matter that will entitle him to affirmative relief. *In re Baker*, 257.

10. *Appeal and Error—Dormant Judgments—Revival—Executions—Insufficient Findings—Case Remanded.*—Where the appeal calls for the determination of the equities between the several defendants and the plaintiff involved in the proceedings to revive a dormant judgment by the issuance of execution, wherein it is claimed that a settlement made by the plaintiff with a defendant released them all, the appeal will be remanded, to be proceeded with in the Superior Court, when the findings of fact by the trial judge upon which he granted the issuance of the execution are sufficient for the Supreme Court to satisfactorily pass upon the rights of the parties. *Johnson v. Murphy*, 384.

11. *Appeal and Error—Motions—Judgments—Excusable Neglect—Findings of Fact—Conclusions of Law.*—In passing upon a motion to set aside a judgment for excusable neglect, the findings of the trial judge, upon supporting evidence, are conclusive on appeal, leaving reviewable only his conclusions of law thereon. *Battle v. Mercer*, 437.

12. *Same—Statutes—Defendant in Possession of Lands—Title—Pleadings—Bond.*—Ordinarily, excusable neglect cannot arise out of a mistake of law; and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, Public Laws 1921, ch. 92, sec. 1 (3), the ignorance of the defendant that he was required to file the bond, before answer, required by C. S., 495, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. *Ibid.*

13. *Same—Pari Materia.*—C. S., 595 (4) and 495, are *in pari materia* with Public Laws 1921, ch. 92, sec. 1 (3), and should be construed together, and the requirements of section 595 (4) must be observed that in an action for the recovery of real property, or for the possession thereof,

APPEAL AND ERROR—*Continued.*

the defendant in possession must give bond before answer, unless he has been lawfully excused therefrom or the plaintiff has waived his legal right thereto. *Ibid.*

14. *Appeal and Error—Objections and Exceptions—Rules of Court.*—The rules prescribed for the presentation of exceptions on appeal will be uniformly enforced, and a general exception that competent and relevant evidence had erroneously been excluded, with broad references to pages of the record, will not be considered. *Leonard v. Davis*, 471.

15. *Appeal and Error — Objections and Exceptions — Instructions — Presumptions.*—On appeal, it will be presumed that the charge to the jury of the trial judge submitted all material and substantive phases of the evidence, when no exception has been taken thereto. *Stevens v. R. R.*, 528.

16. *Appeal and Error—Rehearing—Briefs—Rule of Court—Waiver—Judgments.*—A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief according to Rule 28 and he has not appealed from the judgment. *Greene v. Lyles*, 598.

17. *Appeal and Error—Nonsuit—Voluntary Nonsuit—Estoppel.*—Where the court has properly ordered an involuntary nonsuit as to some of the parties defendant, and thereupon the plaintiff has taken a voluntary nonsuit as to all, the plaintiff is concluded by his action from asserting error on appeal, for that he is entitled at least to judgment against those defendants as to whom he has taken his voluntary nonsuit. *Guano Co. v. Walston*, 666.

18. *Appeal and Error—Certiorari—Motions—Record Proper.*—The Supreme Court will not assume that an appeal has been taken in the Superior Court in the absence of the filing of the record proper, or adequate certification from the clerk of the court to that effect. *Weedon v. R. R.*, 701.

19. *Same—Procedure.*—In order to have the Supreme Court exercise its discretionary power to grant the writ of *certiorari*, which is not controlled by the agreement of the parties, the appellant is required to make his motion therefor not later than the call of his district, and in conformity with the rules of the Court. *Ibid.*

20. *Appeal and Error—Evidence—Objections and Exceptions.*—An exception to testimony excluded by the trial judge is not maintainable unless its relevance or materiality is made to appear in the record on appeal. *S. v. Ashburn*, 718.

APPEARANCE. See Summons, 1.

APPROVAL. See Taxation, 6; Schools, 8; Counties, 1.

ARRAY. See Criminal Law, 17.

ASSAULT. See Criminal Law, 20.

ASSESSMENTS. See Municipal Corporations, 1, 7; State Highways, 2, 3.

ASSOCIATIONS. See Injunctions, 6; Courts, 2.

ASSUMPTION OF RISKS. See Employer and Employee, 2.

AUTOMOBILE. See Taxation, 1, 11; Carriers, 7; Fires, 2; Contracts, 22.

BANKRUPTCY. See Judgments, 10.

Bankruptcy — Liens — Priorities—Mortgages.—Proceedings in bankruptcy can only affect judgment liens acquired within the four months prior period, and not the lien of a valid mortgage included in the judgment subsisting theretofore. *Garner v. Quakenbush*, 603.

BANKS AND BANKING. See Indictment, 1; Removal of Causes, 1; Criminal Law, 5, 7; Evidence, 16; Judgments, 7.

1. *Banks and Banking — Criminal Law — Abstracting Funds—Statutes.*—C. S., 4401, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with chapter 4, Laws 1921, sec. 83, entitled "An act to regulate banking, and repealing all laws in conflict therewith." *S. v. Switzer*, 88.

2. *Same—Depositor—Officers or Agents.*—In order to convict a depositor at a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of C. S., 4401; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of the amendatory act of 1921, ch. 4, sec. 83. *Ibid.*

3. *Same—Indictment—Intent.*—In order for conviction for malfeasance of bank officers and agents under the provisions of C. S., 4401, it is sufficient to allege in the indictment the "intent to defraud, without naming therein the particular person or body corporate intended to be defrauded," etc. (C. S., 4621); and an indictment under section 4401, charging the act "with intent to injure," is held sufficient. *Ibid.*

4. *Same—Principal Offenders.*—Where a depositor, in collusion with the cashier of a bank, has "abstracted" or caused to be abstracted by the cashier moneys of the bank, in violation of the provisions of C. S., 4401, though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. *Ibid.*

5. *Same—Abstracting Funds of Bank—Embezzlement.*—The use of the word "abstract" in C. S., 4401, marks a difference between this statute and C. S., 4268, the latter applying to embezzlement; and under the former statute it is not necessary for the indictment or evidence to comply with the terms of C. S., 4268, excepting offenders under the age of sixteen years. *Ibid.*

6. *Banks and Banking — Statutes — Criminal Law—Abstracting Funds—Evidence—Questions for Jury—Nonsuit—Trials.*—The evidence in this case, that the defendant had violated the provisions of C. S., 4401, in collusion with its cashier, in unlawfully abstracting the funds of the bank, etc., *is held* to be more than a scintilla, carrying the case to the jury, and a judgment as of nonsuit thereon was properly disallowed. *Ibid.*

BANKS AND BANKING—*Continued.*

7. *Banks and Banking — Criminal Law — Abstracting Funds—Statutes.*— The legal meaning of the word "abstract," as it appears in C. S., 4401, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank with the intent to injure or defraud, etc. *Ibid.*

8. *Banks and Banking—Principal and Agent—Bills and Notes—Negotiable Instruments—Holder in Due Course—Agency for Collection.*—A bank is an agency for collection, and not a purchaser in due course, when it discounts its depositor's negotiable paper under an arrangement with him to charge it back to his account if the maker fails or refuses to pay it, and this condition may be implied from the course of dealings between them. *Finance Co. v. Cotton Mills Co.*, 233.

9. *Same—Evidence—Questions for Jury—Trials.*—While a bank, purchasing a negotiable instrument before maturity and for value, *prima facie* takes the paper free from any infirmity in the instrument (C. S., 3032, 3033), it may be shown to the contrary that there was an arrangement between the bank and its depositor that the former had acquired the paper under an arrangement to charge it back to its depositor in the event of nonpayment by the maker; and where the testimony is conflicting, an issue of fact is presented for the jury to determine as to whether the bank was a holder in due course or merely an agency for collection. *Ibid.*

10. *Same.*—Evidence in this case of certain written agreements between the bank and its depositor to the effect that the bank should collect the papers of its depositor that it had discounted, providing for the expense, etc., *is held* sufficient evidence to take the issue of fact to the jury for their determination of the question whether the bank was a holder of the negotiable instrument for value, in due course, as a purchaser before maturity, or was only an agency for collection. *Ibid.*

11. *Same — Mortgages — Liens—Waiver.*—Where there is evidence that a finance corporation had accepted from its depositor, a concern manufacturing motor trucks, a certain negotiable instrument in a series of transactions as an agency for collection, together with a prior registered contract of the manufacturer retaining title to the auto truck, and there was also evidence that the truck in question had been sold to the manufacturer's sales agent within a certain territory, who had, with the knowledge and consent of the officers of the manufacturing concern, sold it to the defendant under a general authority with the manufacturer, who received the benefits of the transaction: *Held*, the question was for the determination of the jury as to whether the manufacturer had waived its right of lien, and parol evidence of the manufacturer's ratification through its proper officers does not fall within the statute of frauds, and is admissible. *Ibid.*

12. *Banks and Banking—Officers—Imputed Knowledge—Bills and Notes—Fraud—Principal and Agent.*—Knowledge of fraud in the procurement of a note by a president of a bank will not be imputed to a bank when he has acted therein to his own personal advantage, and in which the bank has neither participated nor derived any profit or advantage. *Bank v. Wells*, 515.

BANKS AND BANKING—*Continued.*

13. *Same.*—A president of an insolvent bank induced a purchaser for some of his own stock by fraudulently representing that it was worth above par, and, to get the purchase money, sent the purchaser's note therefor to a subsidiary bank, of which he was only a nominal or inactive president, and which was acted upon and accepted and discounted by the officers thereof, whose business it was to pass upon such matters, without knowledge or participation in the fraud, the note being payable to the subsidiary bank for which they were acting: *Held,* the fraud perpetrated by the seller of the stock will not be imputed to the subsidiary or purchasing bank, and it may recover thereon. *Ibid.*

14. *Same—Burden of Proof.*—Where fraud is shown in the procurement of a note, in the payee's suit thereon the burden of proof is on the plaintiff to show that he was a purchaser for value, before maturity, and without knowledge of the fraud. *Ibid.*

15. *Banks and Banking — Drafts — Collection—Actions—Notes—Discharge of Debt Pro Tanto—Rule of Prudent Man.*—Where a bank accepts for collection a bill of lading attached to a draft, upon agreement that the money would be applied to a note the drawer owed it, the bank is under legal obligation to exercise the care of an ordinarily prudent man to collect the draft and apply its proceeds in accordance with its agreement; and an instruction upon a trial on the note that if the jury found that the draft had not been paid to answer the issue in favor of the plaintiff bank, is reversible error, for whatever moneys the plaintiff should have received under the rule stated would be a discharge *pro tanto* of the note it sued on. *Bank v. Knox,* 565.

16. *Banks and Banking—Bills and Notes—Drafts—Bills of Lading—Purchasers in Due Course—Payment—Actions—Claim and Delivery.*—The collecting bank is responsible to the forwarding bank, which has become a purchaser, for value in due course and without notice, of a draft, bill of lading attached, for its payment under attachment of the consignor for shortage in the shipment, under a judgment against the consignee, when the collecting bank has collected the money on the draft, and the proceedings are taken and the judgment obtained without notice to the forwarding bank. *Deposit Co. v. Trust Co.,* 611.

BARGAIN AND SALE. See Vendor and Purchaser, 2.

BENEFICIARIES. See Wills, 21.

BENEFITS. See State Highways, 5; Municipal Corporations, 7; Schools, 16.

BILLS AND NOTES. See Banks and Banking, 8, 12, 16; Actions, 1.

1. *Bills and Notes—Negotiable Instruments—Endorsement—Parol Agreement—Evidence.*—As between the original parties, not affecting the rights of a subsequent holder in due course, the acquisition of a negotiable note secured by mortgage as one of a series by endorsement may be shown by parol evidence to have been upon condition that its payment under foreclosure proceedings was postponed to the prior payment of the other notes in the series. *Ins. Co. v. Gavin,* 14.

2. *Same—Compromise.*—The acceptance by endorsement of an agent for selling real estate, of one of a series of notes secured by a mortgage

BILLS AND NOTES—*Continued.*

upon parol agreement between the owner that its payment from the proceeds of sale should be postponed in the event of foreclosure to that of the other notes in the series, may be upheld as being in the nature of a compromise between the parties of the amount due. *Ibid.*

3. *Same—Memorandum—Writing—Corroboration.*—Where the endorsee of a note secured as one of a series in a mortgage has acquired it after its execution under a valid parol agreement that in the event of foreclosure its payment was to be made from the proceeds of sale in postponement to that of the other notes of the series, and the note so acquired has been lost, and a written memorandum of the parol agreement has later been made, the action may be maintained upon the parol agreement and the written memorandum introduced as corroborative evidence. *Ibid.*

4. *Same—Pleadings—Equity.*—The objection that a valid parol agreement as a consideration upon which an endorsee has acquired a note secured by mortgage, must be pleaded to become available, is untenable, an action thereon being maintainable at law, and no equity of cancellation or correction being required in the action. *Ibid.*

5. *Bills and Notes—Fraud—Burden of Proof.*—Where the defendant admits the execution of his note sued on, and defends upon the ground of fraud, the burden is on him to prove his defense. *Forbes v. Deans*, 164.

6. *Bills and Notes—Negotiable Instruments—Possession—Title—Presumptions—Evidence—Nonsuit.*—In an action upon a negotiable note by one claiming as holder in due course, where the payee or his administrator has intervened and produces the note, upon the trial, not endorsed or assigned, the legal title is presumed to be in the intervener; and, without further evidence, a judgment in his favor against the plaintiff as of nonsuit is properly allowed, and the intervener is entitled to recover thereon against the maker. *Hayes v. Green*, 776.

7. *Same—Statutes.*—While the possession of a negotiable note by one claiming in due course raises the presumption against the maker that such holder has the legal title, this presumption does not extend to the payee of the unendorsed note. C. S., 3040. *Ibid.*

BILLS OF LADING. See Carriers, 3, 4; Banks and Banking, 16.

BILLS OF PARTICULARS. See Indictment, 1.

BIRTH. See Criminal Law, 22.

BOARDING HOUSES. See Constitutional Law, 14.

BOARDS. See Taxation, 9.

BONDS. See Appeal and Error, 12; Injunction, 12; Schools, 6, 13, 17; Tenancy in Common, 5; Statutes, 3; Pleadings, 17.

BOUNDARIES. See Evidence, 34.

BREACH. See Contracts, 2.

BRIEFS. See Appeal and Error, 16.

BROKER. See Principal and Agent, 3.

BURDEN OF PROOF. See Appeal and Error, 3; Instructions, 4; Carriers, 1; Wills, 4; Bills and Notes, 11; Evidence, 10, 32, 43; Railroads, 12; Criminal Law, 10, 15, 22; Actions, 1; Vendor and Purchaser, 4; Banks and Banking, 14.

CANCELLATION. See Principal and Surety, 1; Mortgages, 5.

CARRIERS. See New Trials, 2; Railroads, 7, 11; Corporation Commission, 1.

1. *Carriers of Goods—Railroads—Negligence—Burden of the Issue—Prima Facie Case—Instructions—Appeal and Error—New Trials.*—Upon evidence tending to show that damage was caused to a carload shipment of livestock, received in good condition by the carrier, by fire at one of the carrier's stations, *in transitu*, the fact that the damages were thus caused while the shipment was in the carrier's possession raises only a *prima facie* case of negligence on the carrier's part, and does not shift the burden of the issue of its negligence to it from the plaintiff, and an instruction that places upon the defendant the burden of disproving its own negligence is reversible error. *Austin v. R. R.*, 7.

2. *Carriers of Goods—Consignor and Consignee—Title—Stoppage in Transitu—Evidence.*—While ordinarily a shipment by common carriage vests in the consignee the title to the goods, for the purpose of the shipment, with the right of stoppage *in transitu* by the consignor therein named, such consignor's right may otherwise be shown by transactions and agreements between the parties. *Collins v. R. R.*, 141.

3. *Same—Bill of Lading—Defenses.*—The consignor of a shipment of goods by common carriage, as named in the bill of lading, had bought the goods from another for his customer, and under an agreement between him and his vendor the goods were shipped direct to the customer, and the bill of lading was attached to a draft on the consignor so named, drawn by his vendor, which he refused to pay. The consignee paid for the goods and brought suit against the carrier after the carrier had redelivered the goods to the consignor's vendor on its demand: *Held*, the carrier may show as a complete defense to the action that, by the agreement between the consignor and his vendor, the latter and not the former was the real party in interest as the consignor of the shipment. *Ibid.*

4. *Carriers—Railroads—Bills of Lading—Stipulations as to Commencing Suit—Actions—Evidence—Nonsuit.*—The law imposes a duty upon a common carrier to transport goods it has accepted safely, and to deliver them within a reasonable time; and under its contract of shipment, providing that suits for loss, damage or delay shall be instituted only within two years and one day after a reasonable time for delivery has elapsed, and the evidence in the action tends only to show that this had not been done, defendants' motion as of nonsuit thereon is properly granted. *Corbett v. Payne*, 161.

5. *Carriers—Title—Presumptions—Evidence—Consignor and Consignee—Actions.*—While the title to a shipment of goods upon carrier's open bill of lading is presumed to pass to the consignee, it may otherwise be shown; and where the shipment is refused by the consignee be-

CARRIERS—*Continued.*

cause of being rendered worthless through the carrier's negligence *in transitu*, or redelivered to the carrier by him, the title is revested in the consignor and he may maintain his action against the carrier for damages. *Anderson v. Express Co.*, 171.

6. *Carriers—Railroads—Title—Consignor and Consignee—Actions—Damages—Order Notify Shipments—Vendor and Purchaser.*—The title and right of possession remains with the consignor by common carriage, upon bill of lading attached to draft, order notify consignee, until the draft is paid and the shipment is accepted by him; and where he has exercised his right to reject the shipment for shortage and damage *in transitu*, the consignor's right of action for the loss occasioned by the carrier's negligence is against the carrier, and not against the consignee. *Early v. Flour Mills*, 344.

7. *Carriers — Railroads — Crossings—Signals—Automobiles—Evidence.*—Where there is evidence tending to show that the negligence of the employees on defendant railroad company's train was the proximate cause of a collision at a highway crossing with an automobile in which the plaintiff was a passenger, it is competent for the plaintiff to show that she was in a position and circumstances to have heard the warnings of the approach of the defendant's train, had they been given, and did not hear the warnings, in her action to recover damages for a personal injury. *Williams v. R. R.*, 348.

8. *Same—Evidence—Nonsuit.*—Where there is evidence tending to show that a passenger in an automobile was injured in a collision at a highway crossing with defendant's track by the negligence of the defendant's employees in failing to give the required crossing signals or warnings, the question of contributory negligence is one of defense, of which the defendant railroad company cannot avail itself on its motion to nonsuit. *Ibid.*

9. *Same — Passengers — Contributory Negligence.*—Ordinarily the negligence of the driver of an automobile will not be imputed to one riding therein unless he is the owner of the car or has control of the driver's movements in operating it. And where the evidence is conflicting as to whether the negligence of the railroad company proximately caused the injury to him, or whether it was so caused by the passenger therein, it raises a question for the jury to determine; and the fact that a passenger in an automobile at the time of the injury in suit was neither the owner of the car nor exercising control of the driver at the time of the negligent act, does not always preclude the determination of the issue as to contributory negligence as a bar to the action. *Ibid.*

CARRIERS OF GOODS. See Carriers.

CASE. See Appeal and Error, 10.

CAUSES OF ACTION. See Removal of Causes, 10.

CAVEAT. See Wills, 8, 27.

CEMETERIES. See Constitutional Law, 6.

CERTIORARI. See Appeal and Error, 18.

CHALLENGE TO JURORS. See Criminal Law, 17; Jury, 1, 4.

CHARACTER. See Criminal Law, 3; Evidence, 24.

CHARITIES. See Deeds and Conveyances, 9; Wills, 21.

CHARTER. See Corporations, 1.

CITIES AND TOWNS. See Municipal Corporations, 1, 4, 6; Appeal and Error, 9; State Highways, 2; Statutes, 4; Negligence, 6; Waters, 1.

CLAIM AND DELIVERY. See Banks and Banking, 16; Judgments, 8, 10.

CLASSIFICATION. See Taxation, 10; Criminal Law, 14; Jury, 1.

CLERKS OF COURT. See Pleadings, 8, 13; Sales, 1; Estates, 5; Tenancy in Common, 6.

CLOUD ON TITLE. See Actions, 3.

COLLATERAL ATTACK. See Taxation, 9; Contracts, 4.

COLLATERAL SECURITY. See Dower, 3.

COLLECTION. See Banks and Banking, 8, 15.

COLLECTORS. See Wills, 9.

COLLISIONS. See Admiralty, 1; Railroads, 11.

COMBINATIONS. See Schools, 2.

COMMENCEMENT. See Carriers, 4.

COMMERCE. See Constitutional Law, 2; Pleadings, 1; Statutes, 1; State Highways, 1.

COMPANIES. See Injunctions, 1, 5; Corporation Commission, 1.

COMPARATIVE NEGLIGENCE. See Railroads, 14.

COMPENSATION. See Constitutional Law, 12.

COMPLAINT. See Injunction, 2; Removal of Causes, 8.

COMPROMISE. See Bills and Notes, 2; Evidence, 31.

CONCEALED WEAPONS. See Criminal Law, 11.

CONCEALMENT. See Criminal Law, 22.

CONCLUSIVENESS. See Appeal and Error, 8, 11.

CONDEMNATION. See Constitutional Law, 4, 12; Appeal and Error, 9; Removal of Causes, 8.

CONDITIONS. See Judgments, 1, 11; Limitation of Actions, 1.

CONDITIONS PRECEDENT. See Contracts, 12.

CONFLICT. See Instructions, 4; Juvenile Courts, 4.

CONSIDERATION. See Contracts, 14; Railroads, 15; Deeds and Conveyances, 7.

CONSIGNOR AND CONSIGNEE. See Carriers, 2, 5, 6.

CONSOLIDATED STATUTES.

SEC.

24. In proceedings to caveat a will, clerk may either appoint executor named in will or another as collector. *In re Little*, 177.

160. Action will lie against personal representatives of deceased having caused wrongful death. *Tonkins v. Cooper*, 570.

160. Dying declarations when competent evidence in civil cases. *Dellinger v. Building Co.*, 845.

160. Evidence of employee's injury in head-on collision in action against railroad company sufficient for jury. C. S., 3465-6-7-8. *Hinnant v. Power Co.*, 288.

406, 451. These sections commented on as to estates of *non compos mentis*. *Bank v. Duke*, 386.

411. When judgment against nonresident defendant void for failure of personal service. *Bridgers v. Mitchell*, 374.

415. Plaintiff may show his failure to pay cost of nonsuit before bringing another action was caused by clerk Superior Court. *Hunsucker v. Corbitt*, 496.

416. The provisions of this statute requiring writing to repel bar of statute, expressly excludes payment on debt. *Kilpatrick v. Kilpatrick*, 520.

440 (2). Owner may recover entire damages to his land caused by permanent structure of railroad. *R. R. v. Nichols*, 153.

444 (9). Action must be brought in three years from discovery of fraud and proved by plaintiff; and ten years statute to impress a trust upon laws does not apply to facts of this case. *Little v. Bank*, 1.

445. Ten years statute of limitations does not apply to trust created by a tenant in common in possession who has acquired outstanding title. *Gentry v. Gentry*, 29.

451. Infant must defend by guardian *ad litem* in proceedings to condemn lands. *Long v. Rockingham*, 199.

469. Venue of action by illegitimate infant is county of its mother. *Thayer v. Thayer*, 573.

469-470. Bank and its officers sued for joint tort may not, as a matter of right, have cause removed to county in which bank transacts its business from that of plaintiff's residence. *Curley v. Bank*, 119.

495. Ignorance of defendant in possession of lands of the statute requiring bond does not excuse him therefrom. This statute applies to tenants in common. *Battle v. Mercer*, 437.

495. Complaint not served with summons, defendant in possession of lands has twenty days from return day to file possession bond. When filed the plaintiff has no equity, but has adequate remedy at law. *Jones v. Jones*, 589.

529. Not indispensable that party sign his pleading. *Cahoon v. Everton*, 369.

535. Mere denial of debt alleged is insufficient. *Cahoon v. Everton*, 369.

CONSOLIDATED STATUTES—*Continued.*

SEC.

536. Judge has authority to allow amendment to pleadings on appeal from clerk. *Cahoon v. Everton*, 369.

547, 536, 495. Judge may allow defendant in possession to give bond. *Battle v. Mercer*, 438.

547. Authority of trial judge to allow amendments also applies to the giving of bond by defendant in possession of lands. *Battle v. Mercer*, 437.

554. Allegations of employee that he received injury from railroad company in intrastate commerce taken as true when not denied in the answer. *Barbee v. Davis*, 78.

557. Judge cannot compel parties to trial when issue has not been transferred by clerk more than ten days. *Cahoon v. Everton*, 369.

564. Not error for trial judge to fail to charge jury to scrutinize the evidence, etc., in advance of special requests. *S. v. O'Neal*, 22.

564. Where will of married woman devising property derived from husband to children of another marriage, evidence of an "unconscionable" will. *In re Hardee*, 381.

564. Failure of judge to refer in his charge to evidence of defendant's alibi in trial for homicide, *held*, error. *S. v. Melton*, 481.

567. Plaintiff entitled to every reasonable inference from evidence on defendant's motion as of nonsuit. *Oil Co. v. Hunt*, 157.

567. Evidence in this case *held* sufficient to take case to jury on motion as of nonsuit. *Allen v. Garibaldi*, 798.

595. 596, 597. A judgment by default and inquiry should be rendered when there is a controverted balance of an unpaid account at issue. *Brooks v. White*, 656.

600. Meritorious defense must be shown on notice to set aside judgment for mistake, etc. *Bank v. Duke*, 386.

600. Personal service of summons fixes defendant with notice when answer must be filed. *Lerch v. McKinne*, 419.

637. When clerk of Superior Court evinces jurisdiction given by C. S., 2591, as to resale of lands under mortgage, on appeal it is discretionary with judge to determine the matter or remand. *In re Ware*, 693.

637. Clerk of court has no jurisdiction to issue writ of assistance to put tenant in common in possession of divided land, and none conferred on Superior Court on appeal. He may issue a writ of possession in proper instances. *Bank v. Leverette*, 743.

840. Sufficient pleading for intervening landlord to raise question of his superior lien in action of mortgagor against his tenant. *Hilt v. Patillo*, 531.

860 (1). No equity for receivership when defendant in possession has given bond under section 495. *Jones v. Jones*, 589.

CONSOLIDATED STATUTES—*Continued.*

SEC.

921. Evidence of service in condemnation of infant's land sufficient to take case to jury. *Long v. Rockingham*, 199.

987. Statute does not apply when promissor personally assumes the debt of another. *Taylor v. Lee*, 393.

997. Statute contemplates personal presence of wife whose separate examination is taken by probate officer, and is void if taken by phone. *Bank v. Sumner*, 762.

1039, 1071. When Corporation Commission may fix a joint freight rate for lumber company and railroad connection. *Corporation Commission v. R. R.*, 424.

1157. In absence of fraud, valuation of property for shares of stock by directors of corporation is conclusive. *Gover v. Malever*, 774.

1414. State court may allow amendment to pleadings on motion to remove cause to Federal court. *Morganton v. Hutton*, 736.

1473. This statute includes claim of inchoate right of dower. *Bank v. Sumner*, 762.

1667. Wife may now sustain her civil action for support, etc., without first having the issue of validity of marriage determined. *Barbee v. Barbee*, 538.

1724. Right of appeal preserved by this section when charter of city or town does not give it in condemnation of lands. *Long v. Rockingham*, 199.

1738. Deed to grantee and children not *in esse* vests title in child or children therein upon birth. *Johnson v. Lee*, 753.

1742. A spendthrift trust may not exceed an annual income of $500 a year net. *Bank v. Heath*, 54.

1784. Experts may testify opinion that name registered on hotel book is the same as those signatures admitted to be genuine. *S. v. Hendricks*, 327.

1795. One not a member of a partnership is not excluded from testifying as to whether a deceased person was a member of the firm. *Herring v. Ipock*, 459.

1915. Assessment of lands by city along street improved is superior to other liens. *Bank v. Watson*, 107.

2144. Fraud practiced upon one with whom speculator has pledged stock as collateral is not within the gaming statute. *Gladstone v. Swaim*, 712.

2316. Not error for trial judge to continue trial when disqualification of juror has been removed. *S. v. Ashburn*, 717.

2325. Adverse party cannot now admit cause of challenge to juror before he has been actually challenged. Not affected by C. S., 4634. *S. v. Ashburn*, 717.

2338, 2339. Method of drawing special venire for capital offenses is within the judge's discretion under these sections. *S. v. Levy*, 581.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2355. The landlord's right of lien does not alone deprive coöperative association of rights under its contract to its member's tobacco. *Cooperative Assn. v. Bissett*, 180.

2365, 2367. Landlord party to bring action of ejectment against tenant holding over after expiration of lease. *Shelton v. Clinard*, 664.

2438, 2440, 2442. Owner of building must account to material men who give notice, etc., before his final settlement with original contractor. When subcontractor may bring his action without filing lien in court. *Porter v. Carr*, 629.

2439-40-41-69-74. When notice given owner of building for subcontractor's claim, their liens are not required to be filed in court, and suit brought within six months thereafter. *Campbell v. Hall*, 464.

2445. Surety on bond of contractor for municipal building, before the act of 1923, not liable for debt of material furnishers when bond not so providing. *Warner v. Halyburton*, 414.

2470, 2474, 2479. Subcontractors for building to file lien in court, according to jurisdiction, and bring action, each within the time the statute specifies. *Porter v. Case*, 629.

2591. Clerk has jurisdiction only to order a resale upon the raising of bid at mortgage foreclosure sale. *In re Ware*, 693.

2594. Statute includes deeds in trust to secure money loaned, and cancellation by register of deeds may be relied on by subsequent mortgagees. *Guano Co. v. Walston*, 667.

2763, 2764, 2766. Highest degree of care required of those furnishing electricity to customers. *McAllister v. Pryor*, 832.

2787. A lumber yard in old residential portion of municipality may be declared a nuisance by ordinance. *Turner v. New Bern*, 541.

3032, 3033. *Prima facie* case that bank takes without notice of infirmity of negotiable paper may be rebutted by evidence *per contra*. *Finance Co. v. Cotton Mills*, 233.

3040. Presumption of title to negotiable instrument by possession of holder does not extend to payer of unendorsed note. *Hayes v. Green*, 776.

3231. Judgment of clerk, not appealed from in partitioning lands, operates as an estoppel. *Bank v. Leverette*, 743.

3234, 3235. Sale of contingent interests in remainder cannot be made unless provisions of statute complied with and action originally brought in Superior Court. *Ray v. Poole*, 749.

3259. Creditors of partnership not required to exhaust partnership assets before enforcing demand against individual property of partners. *Chemical Co. v. Walston*, 817.

3323, 3324. See *Bank v. Sumner*, 762.

3465-6-7-8. Evidence of injury in head-on collision of defendant's railroad trains sufficient to take case to jury. C. S., 160. *Hinnant v. Power Co.*, 288.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3836. To obtain a way of necessity over the lands of another to a public road petitioner must show that it is reasonable, necessary and just. *Rhodes v. Shelton*, 716.

4098. Dower defined. *Chemical Co. v. Walston*, 817.

4158, 4159, 4161. Filing will and bond in proceedings to caveat will stays further proceedings except when necessary to preserve estate. Amendment of Laws 1907 regarding limitations of action does not affect these sections. *In re Little*, 177.

4213. The evidence must tend to show a secret assault, for conviction. *S. v. Oxendine*, 658.

4228. Evidence in this case that defendant was guiltless of the intent to conceal newly-born child, etc., made it reversible error for a directed verdict of guilty. *S. v. Arrowood*, 715.

4235, 4643. Evidence of recent and unlawful possession sufficient for conviction. *S. v. Williams*, 492.

4268. Difference between "abstracting" funds by bank officer and embezzlement. *S. v. Switzer*, 88.

4284. The fraudulent intent is necessary for conviction under this statute. *S. v. Barbee*, 703.

4401. For conviction of malfeasance of bank officer it is unnecessary for indictment to specify particular persons defrauded. Officer responsible when another causes act of malfeasance. Indictment sufficient if substantially complies with statute. The word "abstract" defined. *S. v. Switzer*, 88.

4410. Evidence sufficient to convict for carrying a concealed weapon. *S. v. Mangum*, 477.

4512. Conviction for misdemeanor (C. S., 4173, 4448, 4449) barred unless brought in two years, unless presentment found within that period. *S. v. Hedden*, 803.

4613. Bank officer abstracting funds should request bill of particulars. *S. v. Switzer*, 88.

4621. Indictment sufficient to convict bank officer of malfeasance. *S. v. Switzer*, 88.

4633. This section was to procure a fair and impartial trial. *S. v. Ashburn*, 717.

4643. Evidence of defendant's negligence in driving automobile, causing personal injury, *held* sufficient to deny motion as of nonsuit thereon and sustain conviction of homicide. *S. v. Crutchfield*, 607.

4643. Failure to renew motion of nonsuit after all the evidence is a waiver of right of motion after plaintiff's evidence. *S. v. Hayes*, 490.

5058, 5039, 5054, 5046, 5047. When juvenile court has adjudged a child a ward of the State it may only be attacked in Superior Court, and personal service on parents not required. *In re Coston*, 509.

CONSOLIDATED STATUTES—*Continued.*

SEC.

5473, 5526, 5530. To extend a special school-tax district to take in non-special tax territory, a petition and election in the latter is required. *Jones v. Board of Education*, 557.

5530. Statute not applicable requiring a school-tax district incorporated in an enlarged one to have approved a special tax when the district as a whole has done so. *Sparkman v. Comrs.*, 241.

5530. When outlying territory added to special-tax school district must vote upon question of special school tax. *Blue v. Trustees*, 431.

6985. Vessels on State's inland waterway exempt from pilot laws. *Harris v. Slater*, 163.

7772. Inheritance tax imposed on nonresident owners of domestic corporation's share of tax is constitutional. *Trust Co. v. Doughton*, 263.

CONSOLIDATION. See Insurance, 2; Schools, 1, 5, 13, 16.

CONSTITUTION.

ART.

I, sec. 2. Reversible error for trial judge to charge as a fact proven as to murder, when evidence thereof has been excluded. *S. v. Love*, 32.

I, sec. 14. Punishment for carrying a concealed weapon under the facts of this case, *held* not objectionable as excessive, unusual or cruel. *S. v. Mangum*, 477.

I, sec. 16. Statute requires the finding of fraudulent intent necessary for conviction, and is constitutional. *S. v. Barbee*, 703.

I, sec. 17. A contingent remainderman in lands cannot be held as disseized of freehold by payment of testator's debts, as being contrary to laws of the land. *Const. Co. v. Brockenbrough*, 65.

I, sec. 17. The inheritance tax on shares of stock in domestic corporation of nonresident distributee of decedent's estate is constitutional. *Trust Co. v. Doughton*, 263.

I, sec. 17. Reversible error to deny defendant in criminal action right of cross-examination of State's witnesses. *S. v. Hightower*, 300.

IV, sec. 1. Distinction between suits in equity and actions at law abolished in cases for specific performance, and in this case usually was by motion to make pleadings specific. *Green v. Harshaw*, 213.

V, sec. 3. Laws of 1919, 1920, requiring railroad companies, etc., to pay State tax earlier than to counties, etc., are constitutional. *R. R. v. Lacy*, 615.

V, sec. 6. Counties may exercise delegate power to impose tax as governmental agencies. *R. R. v. Reid*, 320.

V, sec. 7. Statute may not authorize county to levy tax for its general expense beyond the constitutional limitation. *R. R. v. Reid*, 320.

V, sec. 33. A uniform levy of *ad valorem* tax among those of same class is constitutional. *Gastonia v. Cloninger*, 765.

VII, sec. 7. County bridges and home are necessary expenses. *R. R. v. Reid*, 320.

CONSTITUTION—*Continued.*

ART.

VII, sec. 7. See *Lovelace v. Pratt*, 686.

VII, sec. 9. A uniform levy of *ad valorem* tax uniform as to class is constitutional. *Gastonia v. Cloninger*, 765.

IX. Counties may be given legislative authority to assume indebtedness, etc., under State-wide system of public schools. *Lovelace v. Pratt*, 686.

XIX, sec. 1. Constitutional right of trial by jury not given when statutory authority given school board of city to select site for building. *McInnish v. Board of Education*, 495.

CONSTITUTIONAL LAW. See Criminal Law, 1, 6, 12, 14; Homicide, 2; Pleadings, 5; Schools, 4, 9, 12; Taxation, 3, 5, 14; Counties, 1; State Highways, 4; Municipal Corporations, 8; Tenants in Common, 8.

1. *Constitutional Law—Statutes—Due Process—Valid Rights—Estates—Contingent Interests—Wills—Devises—Debts Due by the Testator.*—A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the Federal Constitution, Art. I, sec. 10, prohibiting the enactment by any State of a law impairing the obligation of a contract; or to the Fourteenth Amendment of the Federal Constitution, sec. 1, as to depriving a citizen of his property without due process of law; or contrary to the provisions of our State Constitution, Art. I, sec. 17, prohibiting that a person be disseized of his freehold, etc., except by the law of the land. *Const. Co. v. Brockenbrough*, 65.

2. *Constitutional Law—Statutes—Federal Employers' Liability Act—Commerce.*—The Federal Employers' Liability Act is valid and binding upon the State courts under the commerce clause of the Federal Constitution. *Barbee v. Davis*, 78.

3. *Same—Evidence.*—Where a railroad company has failed in apt time to plead defenses under the Federal Employers' Liability Act, and has thereby waived its right, and the trial has been proceeded with upon the allegations of the complaint that the plaintiff, its employee, had been injured while performing his duties in intrastate commerce, evidence that he was so engaged in interstate commerce is irrelevant and properly excluded. *Ibid.*

4. *Constitutional Law—Statutes—Due Process—Appeal—Condemnation—Public Use.*—Though our State Constitution is silent upon the subject, in order to take private property by condemnation for a public use, it is necessary for a statute permitting it to require just compensation to be paid the private owner of land so taken, and to provide that the owner be heard in the proceedings upon notice, with further right of appeal to the court in conformity with the due-process clause. *Long v. Rockingham*, 199.

CONSTITUTIONAL LAW—*Continued.*

5. *Same—Procedure.*—A statute permitting a municipal corporation to take private property for a public use, by condemnation, should be substantially followed by a municipality in taking advantage of its provisions, and the statute will not be declared invalid unless the nullity of the act is beyond a reasonable doubt. *Ibid.*

6. *Same—Cemeteries.*—Where the charter of a city or town provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (C. S., 1724), applying to municipal corporations, this right of appeal is preserved, and the charter provisions of the city or town will not be declared for that reason unconstitutional by the courts. *Ibid.*

7. *Same—Guardian and Ward.*—Where an infant is the owner of lands sought to be condemned by a municipality for cemetery purposes, such infant must defend by her general guardian, where one has been appointed (C. S., 451); and where service of process has been made upon the general guardian, and it appears upon the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. C. S., 921. *Ibid.*

8. *Same.*—Where the general guardian has been made a party to proceedings to condemn land by a municipality of his ward's land for cemetery purposes, he is the proper one to appeal to the Superior Court, and prosecute it when dissatisfied with the value placed upon the ward's lands by the assessors appointed under the statute. *Ibid.*

9. *Constitutional Law — Statutes — Contracts—Coöperative Marketing.*—The provisions of the standard contract made by the Tobacco Cooperative Marketing Association with its members are valid under a constitutional statute, and upon the alleged breach thereof on the part of the member in its material parts, the equitable remedy by injunction is available to the association. *Tobacco Assn. v. Patterson,* 252.

10. *Constitutional Law—Statutes—Coöperative Marketing.*—A coöperative association formed under the provisions of chapter 87, Public Laws of 1921, whereby its members agree to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable. *Tobacco Assn. v. Battle,* 260.

11. *Constitutional Law — Statutes — Corporations—Taxation—Inheritance Tax.*—Every presumption is in favor of the constitutionality of a statute, and the legal fiction that shares of stock, being personal property, is considered as being with the person of a nonresident shareholder, will not be so construed as to invalidate a statute taxing its transfer as an inheritance tax. *Trust Co. v. Doughton,* 264.

CONSTITUTIONAL LAW—*Continued.*

12. *Constitutional Law — Condemnation — Just Compensation.*—The principle that private lands may not be taken for a public use without just compensation is as much a part of our organic law as if it had been expressly written into our State Constitution. *Shute v. Monroe*, 676.

13. *Same — Statutes — Procedure.*—The statutory provisions under which private lands may be acquired for a public use must ordinarily be complied with. *Ibid.*

14. *Constitutional Law — Contracts—Imprisonment—Debt—Statutes—Innkeeper—Boarding Houses.*—The misdemeanor prescribed by C. S., 4284, for one who obtains lodging, food, or accommodations from an inn, boarding or lodging place, expressly applies, by the expression of the statute, when the contract therefor has been made with a fraudulent intent, and this intent also exists in his surreptitiously absconding and removing his baggage without having paid his bill, and this statute is not inhibited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. *S. v. Barbee*, 703.

15. *Same—Evidence.*—In order to convict under the provisions of C. S., 4284, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. *Ibid.*

CONTENTIONS. See Instructions, 8.

CONTINGENT INTERESTS. See Constitutional Law, 1; Wills, 26.

CONTINGENT REMAINDERS. See Estates, 1, 3, 5; Wills, 15; Deeds and Conveyances, 13.

CONTRACTS. See Municipal Corporations, 2; Evidence, 6; Principal and Surety, 1; Constitutional Law, 9, 14; Equity, 1; Injunctions, 7, 12; Pleadings, 6; Corporations, 4; Railroads, 15; Gaming, 1; Vendor and Purchaser, 2; Principal and Agent, 5; Liens, 1, 4.

1. *Contracts—Coöperative Marketing—Landlord and Tenant—Statutes—Liens — Possession — Trusts — Nonmember Tenant — Penalties.*—The landlord and tenant act (C. S., 2355) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Coöperative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. *Coöperative Assn. v. Bissett*, 180.

CONTRACTS—*Continued.*

2. *Contracts—Breach—Damages—Corporations—Shares of Stock—Unlawful Motive.*—While the facts in the instant case do not involve approval of the broad doctrine that if a person has the lawful right to do a thing the act remains essentially lawful when done under any conceivable motive, upon the facts disclosed *it is held* that the exercise of the right complained of, which does not infringe the legal right of another, is not actionable, even if prompted by an evil motive. *Bell v. Danzer*, 224.

3. *Same—Interest.*—Where the defendants have breached their contract to purchase plaintiff's shares of stock in a corporation, interest will begin to run from the date of the contract when the plaintiff was then ready to deliver it. *Ibid.*

4. *Contracts — Fraud—Coöperative Associations—Collateral Attack—Quo Warranto—Corporations.*—A member of a coöperative tobacco growers association, formed and incorporated under a valid statute, cannot attack the validity of the organization for lack of a sufficient number of signers, it being for the State upon a *quo warranto* to vitiate the incorporation. *Pittman v. Tobacco Growers Assn.*, 340.

5. *Contracts—Coöperative Associations—Fraud—Evidence—Questions for Jury.*—Evidence that a member of a coöperative tobacco growers association had been afforded ample opportunity to read and understand the membership contract before signing it, and who could have done so, is sufficient to take the case to the jury upon his defense that he had been induced by the fraudulent misrepresentations of the association as to its contents. *Ibid.*

6. *Same—Instructions.*—The fraudulent misrepresentations upon which a party seeks to set aside his written contracts must, among other things, have been reasonably relied on, and an instruction to this effect upon the evidence in this case *is held* to be without error. *Ibid.*

7. *Same—Promissory Representations.*—Promissory representations looking to future profits or advantages cannot be considered upon the issue as to whether a party signing a contract with full opportunity to know its contents was induced thereto by the fraudulent misrepresentations of the other party to the contract. *Ibid.*

8. *Contracts — Breach — Specific Performance — Coöperative Marketing—Statutes.*—A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract, for the failure to market the tobacco of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. *Tobacco Association v. Bland*, 356.

9. *Same—Injunction—Equity.*—The right given by chapter 87, section 17c, Laws 1921, to a tobacco marketing association formed under the provisions of said chapter 87, to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process, and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. *Ibid.*

CONTRACTS—*Continued.*

10. *Same.*—A tobacco marketing association, formed under the provisions of the statute, upon the hearing as to continuing its temporary restraining order, must bring itself within the equitable principles applicable, and the temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. *Ibid.*

11. *Same—Pleadings.*—Upon the application of a tobacco marketing association, formed under the statute, for an injunction against its member from breaching his contract by failure to market his tobacco through the association, the defendant made it properly to appear, upon the hearing as to continuing the preliminary restraining order, that he had complied with his contract as far as he was able, but that the failure of the plaintiff to pay him for the large portion of his crop marketed through it under the terms of the contract forced him to market otherwise a small portion of his crop to raise money for supplies necessary for the support of himself and family: *Held*, the general denial by the plaintiff of owing the defendant anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient, and an order of the Superior Court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper, under the evidence in this case. *Ibid.*

12. *Contracts, Written — Parol Evidence — Conditions Precedent.* — While parol evidence is not permissible to correct, modify, or change the written expressions of a contract, it may thus be shown that the contract depended for its validity upon a condition precedent that had been agreed upon, and that the failure of performance of this condition rendered the contract itself invalid. *Tobacco Growers Assn. v. Moss*, 421.

13. *Same—Coöperative Marketing Associations—Statutes.*—Where a member of a coöperative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof, or obligated by the contract sued on for the failure of the association to obtain a certain membership within the territory. *Ibid.*

14. *Contracts — Employment for Life — Consideration—Railroads.*—A contract for the continued employment of a railroad company for his life, in consideration of the employee's forbearance to sue the company for damages he has received, caused by the company's negligence, is not invalid for indefiniteness of the duration of the employment, and is supported by a sufficient consideration. *Stevens v. R. R.*, 528.

15. *Same—Evidence.*—Where a railroad company is sued by its employee for breach of a valid contract of employment for life, in consideration of forbearance of its employee to sue for damages for a personal injury negligently inflicted by it while in its employment, evidence of the extent of such injury is competent upon the question of the sufficiency of the consideration to support the contract. *Ibid.*

CONTRACTS—*Continued.*

16. *Contracts — Material Furnishers — Principal and Surety—Liens—Statutes.*—The payment by the railroad company direct to those who had valid claims for materials, etc., furnished the contractor for the construction of a bridge, upon notice given, is a proper charge against the surety on a bond given for the faithful performance by the contractor, conditioned that the railroad company might at any time pay any moneys directly to those having claims for materials furnished for the purpose of the contract, without reference to the statutory lien law. *R. R. v. Crafts*, 561.

17. *Same—Negligence—Personal Injuries.*—Where a railroad company has paid a judgment obtained against it for the negligence of its contractor for failing to furnish his employees a safe place to work in the construction of a bridge, the surety on the contractor's bond is liable when the contract provides that the contractor shall save the railroad harmless for damages resulting to employees from accidents, injuries, etc., and the provisions of the indemnity bond are to save the railroad company harmless from liens of material, labor or other liens, and "in all other respects in said agreement provided for." *Ibid.*

18. *Same—Appeal and Error—Record—Judgments—Estoppel.*—A decision of the Supreme Court on appeal in an action by an employee against a contractor for the erection of a bridge for a railroad company, wherein the surety bond is not set out, holding that the surety is not liable to the railroad company for the contractor's negligence, is not an estoppel by judgment in the railroad's subsequent action upon the bond to recover the amount of damages it has paid the employee, when it is made to appear on a second appeal, by a full and complete record, that the damages sought were in the contemplation of and provided for in the surety bond. *Ibid.*

19. *Contracts—Evidence—Legal Sufficiency.*—To sustain an action upon contract, the plaintiff's evidence must be sufficient in law to show the mutual agreement of the minds of the parties upon the subject-matter. *Overall Co. v. Holmes*, 186 N. C., 431, cited and approved as to the definition of a contract. *Garrison v. McGimpsey*, 700.

20. *Contracts—Deeds and Conveyances—Parol Evidence.*—In an action to recover upon certain mortgage notes given for the purchase of certain lands, on which was a hotel containing certain articles of furniture, and the defendant sets up a counterclaim for damages for the breach by plaintiff of his contract to deliver the furniture: *Held*, the failure of the plaintiff's deed to include the furniture does not exclude defendant's evidence upon his counterclaim, the statute of frauds not requiring contracts in this respect to be in writing, and the parol evidence not being contradictory of the written instrument. *Anderson v. Nichols*, 808.

21. *Contracts—Vendor and Purchaser — Principal and Agent—Issues—Appeal and Error.*—Where the pleadings and evidence raise a question of fact necessary to the complete termination of the controversy, the issue so presented and aptly tendered may be insisted upon by a party, and its refusal by the trial judge is reversible error. *Erskine v. Motor Co.*, 826.

CONTRACTS—*Continued.*

22. *Same—Automobiles—Local Territory—Pleadings—Evidence—Questions for Jury.*—Where a manufacturing company of automobiles has contracted to place its local agency for exclusive sale with the plaintiff in the action at two towns in adjoining territory, and has breached its contract as to one of them, and the pleadings and evidence tend to show that it was necessary for the plaintiff to have the agency in both places to obtain the benefits under his contract, a material and necessary issue to the determination of the controversy is thereby raised for the determination of the jury. *Ibid.*

CONTRACTS, WRITTEN. See Contracts.

CONTRIBUTION. See Municipal Corporations, 9.

CONTRIBUTORY NEGLIGENCE. See Railroads, 1, 14; Admiralty, 1; Carriers, 9; Negligence, 4; Evidence, 43.

CONVERSION. See Dower, 6.

CO-OPERATIVE MARKETING. See Contracts, 1, 4, 5, 8; Constitutional Law, 9, 10, 13; Equity, 1; Injunctions, 6, 7, 11, 12; Pleadings, 6; Corporations, 4.

CORPORATIONS. See Contracts, 2, 4; Constitutional Law, 11; Taxation, 2; Deeds and Conveyances, 6; Actions, 4.

1. *Corporations — Taxation — Shares of Stock — Inheritance Tax—Charter.*—A State creating a corporation has the power to impose an inheritance tax upon the transfer by will or devolution of the stock of such corporation held by a nonresident at the time of his death, by reason of its authority to determine the basis of organization and the rights and liabilities of all of its shareholders therein. *Trust Co. v. Doughton*, 264.

2. *Corporations—Shares—Courts—Jurisdiction—Status of Shareholders.*—A certificate of stock is a written acknowledgment by a corporation of the interest of the holder in its property and franchise, the legal status of which is in the nature of a chose in action, and the value of the shares is measured by the value of all the property owned by the corporation, including its franchise, entitling him to his proportionate share of the profits during its continuance, and to his *pro rata* share in its net assets upon its dissolution. *Ibid.*

3. *Corporations—Shareholders—Statutes—Public Policy.*—It is the policy of this State, since 1887, as ascertained by the interpretation of our statutes on the subject, to regard the interest of a stockholder in a domestic corporation, for the purpose of taxation, as identical with that of the corporation. *Ibid.*

4. *Corporations—Coöperative Association—Contracts—Mismanagement.*—A member of a tobacco growers association cannot avoid his membership contract upon the ground of mismanagement of the corporation after its organization. *Pittman v. Tobacco Growers Assn.*, 340.

5. *Corporations—Subscription to Shares of Stock in Property—Directors—Statutes—Evidence—Nonsuit.*—C. S., 1157, makes the judgment of the board of directors, in fixing the value of property of its subscribers to its shares of stock to be accepted in lieu of money, arbitrary and

CORPORATIONS—*Continued.*

of artificial weight, in the absence of fraud; and where there is no evidence of fraud therein, a judgment as of nonsuit is properly granted. *Gover v. Malever*, 774.

6. *Corporation Commission — Railroads—Carriers—Lumber Companies—Statutes—Rates—Joint Rates.*—A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Corporation Commission, under the provisions of C. S., 1039; and when it is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. C. S., 1071. *Corporation Commission ex rel. Granite Co. v. R. R.*, 424.

CORRECTION. See Taxation, 9; Verdict, 2; Evidence, 32.

CORROBORATION. See Bills and Notes, 3; Evidence, 26, 39, 42.

COSTS. See Limitation of Actions, 1; Constitutional Law, 15.

COUNTERCLAIMS. See Railroads, 4.

COUNTIES. See Taxation, 5, 7; Schools, 5, 15; Statutes, 3; Municipal Corporations, 9.

1. *Counties—Schools—Taxation—Constitutional Law—Election—Approval of Voters.*—When necessary to maintain the six-months term of public schools required by the Constitution, Art. IX, it is within the legislative authority, in establishing its State-wide system, to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public-school system of the State; and it is not required, in this instance, that the question of taxation for the purpose be submitted to the voters of the territory, under the provisions of the Constitution, Art. VII, sec. 7. *Lacy v. Bank*, 183 N. C., 373, cited and applied. *Lovelace v. Pratt*, 686.

2. *Same—Statutes.*—The county commissioners, under the provisions of the Consolidated Public School Law of 1923, are given authority to fund the outstanding indebtedness of a school district for the necessary maintenance of a six-months term of public schools existing prior to 1923, when in excess of ten thousand dollars, by issuing serial notes of the county or serial bonds thereof, and to levy annually a special *ad valorem* tax on all the tangible property of the county sufficient to pay the same, principal and interest, as they mature, in addition to all other taxes authorized by law to be levied therein; and such indebtedness, incurred upon the order of the county commissioners, upon petition of the school district therein, upon plans for necessary buildings and their location, approved by the State Superintendent of Public Instruction, is a valid binding obligation upon the county. *Ibid.*

COUNTS. See Verdict, 1; Criminal Law, 8; Municipal Corporations, 4; Courts, 1.

COUNTY BOARD OF EDUCATION. See Schools, 2.

COUNTY COMMISSIONERS. See Schools, 2.

COURTS. See Railroads, 5, 8; Corporations, 2; Verdict, 2; Criminal Law, 16; Jury, 3; Removal of Causes, 3, 5, 7; Judgments, 13; Tenancy in Common, 6.

1. *Courts—Indictment—Counts—Criminal Law—Election of Remedies.*—Where there are several offenses charged in the bill of indictment, of the same grade of crime and punishable alike, it is, on defendant's motion, within the sound discretion of the trial judge to quash or compel the solicitor to elect. *S. v. Switzer*, 88.

2. *Courts — Jurisdiction—Unincorporated Associations—Mandamus.*—The courts have no jurisdiction over the management of an unincorporated association, or order, by mandamus, wherein there has been no violation of criminal law, or where the deprivation of property rights is not in question. *Jenkins v. Carraway*, 405.

3. *Courts — Discretion — Appeal and Error—Objections and Exceptions—Juror's Relationship to Party.*—It is within the sound discretion of the trial judge to refuse a motion to set aside a verdict for relationship of a juror to a party litigant, when the general question of relationship had been asked without response, and the trial had been proceeded with without further question or objection. *Anderson v. Nichols*, 808.

COVENANT. See Deeds and Conveyances, 7.

CREDITOR. See Fraud, 2.

CREDITOR'S BILL. See Actions, 4.

CRIMINAL LAW. See Banks and Banking, 1, 6, 7; Courts, 1; Homicide, 1, 5; Indictment, 1; Evidence, 19, 29, 33, 35, 36; Judgments, 11; Fires, 2; Jury, 5; Abandonment, 1.

1. *Criminal Law — Intoxicating Liquor—Witnesses—Defendants—Constitutional Law—Incrimination.*—A defendant in a criminal action, by becoming a witness in his own behalf, acknowledges the right of the prosecution to test his credibility, and waives his constitutional privilege not to answer questions tending to incriminate him or to prove the specific offense with which he is charged. *S. v. O'Neal*, 22.

2. *Same—Cross-Examination.*—Where, upon denial of the criminal offense of the unlawful sale of spirituous liquor, the defendant takes the stand as a witness in his own behalf, he may be cross-examined as to any circumstance of probative value to show his opportunity for the manufacture and possession of the intoxicating liquor. *Ibid.*

3. *Same—Evidence—Character.*—Where the defendant's witness has testified as to the defendant's general character, in a criminal action for the unlawful sale of intoxicating liquors, that he had heard the defendant's character discussed by blockaders, etc., upon the trial of others for a like offense, it is incompetent for the defendant to show by this witness that the defendant had been active to destroy the liquor business in this locality, as an attempt to show a particular trait of character on a matter of general reputation, though the witness of his own volition may have so qualified his testimony as to general reputation. *Ibid.*

CRIMINAL LAW—*Continued.*

4. *Criminal Law—Intoxicating Liquor—Witnesses—Detectives—Interest—Instructions—Special Requests for Instructions—Appeal and Error—Objections and Exceptions.*—In the absence of a special request for instruction, it is not reversible error, under C. S., 564, for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. *Ibid.*

5. *Criminal Law—Banks and Banking—Insolvency—Deposits—Statutes.*—In order for a conviction under the provisions of section 85, chapter 4, Public Laws 1921, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. *S. v. Hightower*, 300.

6. *Criminal Law—Evidence—Opinions—Witnesses—Constitutional Law—Trial by Jury—Prejudicial Error.*—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by our Constitution, Art. I, sec. 17, and a denial thereof may not be held as merely a technicality and harmless; nor is this error cured by the fact that he has had an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other witness is to be regarded as the most important one. *Ibid.*

7. *Criminal Law—Banks and Banking—Solvency—Deposits—Due Course of Business.*—The word "insolvent," in the statute making it a felony for any officer of the bank, etc., to receive deposits therein with knowledge of its insolvency, means when the bank cannot meet its depositary liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the same time on demand. Chapter 4, section 31, Public Laws 1921. *Ibid.*

8. *Criminal Law—Deadly Weapon—Courts—Matters of Law—Questions for Jury.*—An instrument used in an assault which is likely to produce death or inflict great bodily harm upon the one assaulted, in the manner of its use, with regard to the condition of the one assaulted, may be held a deadly weapon, as a matter of law, and is not to be submitted to the jury as an issue of fact unless its use, under the circumstances, may or may not have been likely to produce fatal results. *S. v. Smith*, 469.

9. *Same—Murder—Manslaughter—Instructions—Malice—Presumptions.*—Where the defendant was tried for murder in the second degree and convicted of manslaughter, or the unlawful killing of a human being without malice and without premeditation and deliberation, under evidence tending to show that he had struck on the head and killed the deceased with a baseball bat while engaged in a fight with him, an instruction that the law presumes malice from the use of a deadly weapon is not erroneous. *Ibid.*

10. *Same—Self-defense—Excusable Homicide—Burden of Proof.*—Where it is admitted or established that the prisoner on trial for murder had

CRIMINAL LAW—*Continued.*

killed the deceased with a deadly weapon, but without premeditation and deliberation, the law raises the presumption, first, that the killing was unlawful, and, second, that it was done with malice, which is murder in the second degree; it then being for the prisoner to show to the satisfaction of the jury the facts that would reduce the crime from second-degree murder to manslaughter, or to justify himself upon the plea of self-defense. *Ibid.*

11. *Criminal Law — Concealed Weapons — Evidence—Statutes.*—Upon evidence tending to show that an officer arrested the defendant when the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, with the apparent intent of interfering with the safe-keeping of a prisoner the officer was guarding, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of the statute. C. S., 4410. *S. v. Mangum*, 477.

12. *Same — Punishment — Discretion of Court—Constitutional Law.*—The statute against carrying a concealed weapon is for peace and the preservation of human life and limb, the punishment for its violation being in the discretion of the trial judge imposing the sentence of a fine, not less than $50 nor more than $200, or imprisonment, not less than thirty days nor more than two years; and a sentence to imprisonment for four months, under the facts of this case, *is held* not to be "excessive" or cruel or unusual within the inhibition of Article I, section 14, of the Constitution. *Ibid.*

13. *Criminal Law — Immigrant Agents — License — Statutes.*—An isolated instance of employment of labor in this State for work in progress in another State, by either an individual or corporation, or by the employees of a corporation in charge thereof, does not fall within the intent and meaning of Schedule B, sec. 79, ch. 4, of the Public Laws of 1923, being an act to raise revenue, and the fine or punishment therein imposed for the failure to take out the license prescribed does not apply. *S. v. Lowe*, 524.

14. *Criminal Law — Statutes — Constitutional Law — Taxation—Trades—Classification—License.*—The Legislature has constitutional authority to select and classify occupations and trades for the purpose of taxation, and to impose a license tax on the business of procuring laborers in this State to send into another State to work there, and make it a misdemeanor, imposing a fine or punishment for those who conduct this business in violation of the statute. *S. v. Valley*, 571.

15. *Criminal Law—Taxation—Trades—Misdemeanors—License—Burden of Proof.*—Where the defendant is on trial for a misdemeanor in violating a statute requiring one engaged in the business of hiring laborers in this State to work in another State to pay a tax and obtain a license therefor, the burden is on the defendant to show that he had obtained the license required by the statute. *S. v. Lowe, ante*, 524, cited and distinguished. *Ibid.*

16. *Criminal Law—Homicide—Evidence—Questions for Jury—Courts—Appeal and Error.*—Where the evidence is in law sufficient for the jury to convict the defendant of guilty of a homicide, the verdict accord-

CRIMINAL LAW—*Continued.*

ingly rendered will not be disturbed by the courts because it was rendered upon apparently slight evidence, the weight and credibility being solely within the province of the jury. *S. v. Levy*, 581.

17. *Criminal Law—Jurors—Special Venire—Challenge to Array—Challenge to Polls.*—The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under C. S., 2338, or drawn from the box under C. S., 2339, are both discretionary with the judge of the Superior Court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. The history of the prisoner's right of challenge to the polls, as changed by statute, with right of appeal, reviewed by STACY, J. *Ibid.*

18. *Criminal Law—Homicide—Evidence—Instructions.*—Where there is no evidence upon the trial of a homicide for manslaughter, and the prisoner has been convicted of murder in the second degree, of which there was sufficient evidence, an exception to the charge to the jury on the ground that it restricted the jury to the consideration of the evidence of the greater offense, cannot be sustained on appeal. *Ibid.*

19. *Criminal Law—Homicide—Intent—Evidence—Accident.*—Where two or more conspire together and are the aggressors in a resulting fight with firearms, and in consequence their adversary unintentionally kills an innocent bystander, his antagonists are not responsible for the killing and cannot be lawfully convicted of the homicide, as there was no concerted action by them in that respect. *S. v. Oxendine*, 658.

20. *Criminal Law — Secret Assault — Statutes—Instructions—Appeal and Error.*—While it is not required for the conviction of a secret assault, under the provisions of C. S., 4213, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. *Ibid.*

21. *Criminal Law—Forcible Trespass—Evidence.*—Where there is evidence that the defendant, indicted with others for forcible trespass, was present and acting in concert with another, who forced his way into a dwelling and took by force an occupant therefrom, and thereafter helped force him into the yard, he is guilty of the offense charged in unlawfully invading the possession of another by being present and violently assisting with a strong hand. *Ibid.*

22. *Criminal Law — Statutes — Infanticide — Homicide — Concealment of Birth of New-born Infant — Burying—Evidence—Presumption—Burden of Proof—Directing Verdict—Appeal and Error.*—Under the provisions of C. S., 4228, making it a felony for any person to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and

CRIMINAL LAW—*Continued.*

directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. *S. v. Arrowood*, 715.

CROSS-EXAMINATION. See Criminal Law, 2; Evidence, 13.

CROSSINGS. See Carriers, 7.

CUSTOMS AND USAGES. See Employer and Employee, 3.

DAMAGES. See Railroads, 6, 7, 14; Contracts, 2; New Trials, 2; Carriers, 6; Evidence, 30; Fires, 1; Negligence, 5; Vendor and Purchaser, 3, 4; Waters, 1.

DEADLY WEAPON. See Criminal Law, 8.

DEATH. See Husband and Wife, 2.

DEBT. See Constitutional Law, 1, 14; Pleadings, 11; Equity, 3; Statute of Frauds, 1; Banks and Banking, 15.

DEBTOR AND CREDITOR. See Fraud, 2; Wills, 2; Dower, 2; Partnership, 5.

DECEASED PERSONS. See Partnership, 1.

DECEIT. See Principal and Surety, 1.

DECLARATIONS. See Principal and Agent, 1, 4; Evidence, 34.

DEDICATION. See Easements, 3.

DEDUCTION. See Municipal Corporations, 9.

DEEDS AND CONVEYANCES. See Tenancy in Common, 4; Evidence, 7, 21; Vendor and Purchaser, 1; Fraud, 3; Mortgages, 4; Wills, 19, 20; Principal and Agent, 5; Contracts, 20.

1. *Deeds and Conveyances — Fraud—Limitation of Actions—Statutes—Appeal and Error.*—An action to set aside a deed to lands on the ground of fraud or mistake, C. S., 444 (9), must be brought within three years next after the cause of action accrued, considered as being when the party aggrieved should have discovered the facts constituting the fraud or mistake relied upon in his suit, and the relief afforded by the statute has a broader meaning than the common-law actions, and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit. *Little v. Bank*, 1.

2. *Deeds and Conveyances—Fraud—Statutes—Appeal and Error.*—It is fraud sufficient to set aside a deed to lands where the weakness of the grantor's mind has been controlled by the influence of another to such an extent as to entirely supplant his will and cause him to make an improvident and harmful disposition of his property that he would not otherwise have made; and where in an action of this character there is sufficient evidence to establish this fact, it falls within the three-year statute of limitations, C. S., 444 (9); and a contrary ruling by the trial judge constitutes reversible error. *Ibid.*

3. *Same—Verdict.*—Where the evidence upon the trial to set aside a deed for fraud practiced upon the grantor is sufficient, under the pro-

DEEDS AND CONVEYANCES—*Continued.*

visions of C. S., 444 (9), and the trial judge has erroneously ruled to the contrary as a matter of law, this reversible error is not relieved by the principle that the statute does not begin to run till the influence has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. *Ibid.*

4. *Same—Trusts.*—Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, C. S., 444 (9), limiting the action to three years in cases of fraud, applies; and it is reversible error for the trial judge to hold, as a matter of law, that the ten-year statute relating to actions to impress a trust upon property only was applicable. *Ibid.*

5. *Deeds and Conveyances—Delivery—Intent.*—Whether a deed has been delivered does not depend exclusively upon the question of its physical delivery. Both the delivery and the intent to deliver are necessary. *Gillespie v. Gillespie*, 40.

6. *Deeds and Conveyances — Corporations — Probate.*—Where, upon its face, a conveyance purports to be made by the proper officers of a corporation as the act and deed of the corporation for its lands, and it and its certification for registration by the clerk of the court are regular and in proper form, the deed will not be held as an invalid corporate conveyance for the failure of the notary before whom the proper officers had acknowledged it to certify that such officers acted therein in behalf of the corporation. *Bailey v. Hassell*, 184 N. C., 451; *Bank v. Canaday*, 493.

7. *Deeds and Conveyances — Consideration—Support of Grantor—Covenants — Charge Upon Land—Subsequent Grantees—Notice.*—A conveyance of land upon consideration of the grantee maintaining the grantor for life is a covenant charging the land therewith, and is binding not only on the grantee, but as a charge upon his successors in title who take by deed with actual or constructive notice thereof. *Fleming v. Motz*, 593.

8. *Deeds and Conveyances — Mortgages — Married Women — Probate—Privy Examination—Fraud.*—Where a married woman has signed a mortgage or deed in trust to secure borrowed money, she may not have it set aside upon allegation of fraud of the probate officer in taking her separate examination, when she admits that the examination was taken in substance of the requirement of the statute and she had signed the conveyance, and there is no evidence that the mortgagee in any manner participated in the fraud. *Whitaker v. The Sikes Co.*, 613.

9. *Deeds and Conveyances—Charitable Gifts—Intent—Power of Sale—Religion.*—A deed to a house and lot to the trustees of a certain district of a religious denomination, to be used as a home for the ministers of that denomination in the district, with *habendum* that it be held, kept, maintained and disposed of as such place of residence, will be construed as a whole to effectuate the beneficent intent of the grantor, and the use of the words "disposed of" in the *habendum*

DEEDS AND CONVEYANCES—*Continued.*

was consistent with the purposes expressed in the conveyancing clause, and the trustees named, and their successors, may sell the whole as well as a part thereof and hold and apply the proceeds for the expressed purposes of the gift. *Page v. Covington*, 621.

10. *Deeds and Conveyances — Estates — Remainder — Rule in Shelley's Case.*—Except when otherwise controlled by an arbitrary rule of law, as by the rule in *Shelley's case*, the interpretation of a deed should effectuate the intent of the parties; and where a fee simple is conveyed by a deed to brother and sister, in express terms, with *habendum* to them for and during their joint lives, and to the survivor, with remainder in fee to his or her heirs: *Held*, there is nothing in the *habendum* clause sufficient to affect the fee-simple title theretofore conveyed; and where the sister has died leaving her interest by will to her brother, the latter acquires the absolute fee-simple title to the entire estate. *Bagwell v. Hines*, 690.

11. *Deeds and Conveyances—Interpretation—Intent.*—The court, in interpreting a deed to lands, will give effect to the intent as gathered from the instrument construed as a whole, when not controlled by an arbitrary rule of law, and the *habendum* clause may be considered in ascertaining the true intent of the instrument. *Johnson v. Lee*, 753.

12. *Same—Estates—Remainders.*—A conveyance of land in the premises to the grantee, his heirs and assigns, subject to limitations thereinafter set forth, with *habendum* to him for and during the period of his natural life, and after his death, to his children then living, and those who may hereafter be born to him (as set forth in a former deed in the chain of title), and covenant to the grantee and his children and their heirs and assigns; and under the former deed it appears that the fee of the grantee in the later deed appeared as set forth in the *habendum* and warranty, but that at the time of the prior conveyance the grantee was a young unmarried man: *Held*, the present deed will be construed to effectuate the intention of the parties as expressed more definitely in the *habendum* and warranty, with a life estate only to the first taker. *Ibid.*

13. *Same — Title—Fee Simple—Contingent Remainder—Statutes.*—Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then *in esse*, the first taker holds the legal title until the birth of children after his marriage, at which time such estate becomes vested, such remainder being contingent until the birth of a child during the existence of the freehold estate, and then vests in such child or children who would then take and hold the interest. C. S., 1738. *Ibid.*

14. *Deeds and Conveyances—Acknowledgments—Husband and Wife—Married Women—Telephones.*—C. S., 997, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by sections 3323 and 3324, as to acknowledgments of grantors and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her. *Bank v. Sumner*, 762.

DEEDS OF TRUST. See Mortgages, 5.

DEFAULT. See Pleadings, 8, 12, 15; Mortgages, 1; Judgments, 7, 8, 9, 12, 15.

DEFEASIBLE FEE. See Wills, 15.

DELIVERY. See Deeds and Conveyances, 5.

DEMURRER. See Injunctions, 2, 9; Railroads, 5; Evidence, 5, 29, 30.

DEPOSITS. See Banks and Banking, 2; Criminal Law, 5, 7; Evidence, 16; Judgments, 7.

DESCENT AND DISTRIBUTION. See Wills, 11, 18, 21.

DESCRIPTION. See Evidence, 7.

DETECTIVES. See Criminal Law, 4.

DEVISES. See Constitutional Law, 1; Estates, 1, 3, 4; Wills, 16, 19, 23, 24, 25.

DIRECTING VERDICT. See Admiralty, 1; Evidence, 4; Instructions, 6; Criminal Law, 22.

DIRECTOR GENERAL. See Railroads, 16.

DIRECTORS. See Corporations, 5.

DISCHARGE. See Banks and Banking, 15.

DISCRETION. See Removal of Causes, 2; Wills, 7; Jury, 3; Courts, 3.

DISCRETION OF COURT. See Pleadings, 1; Criminal Law, 12.

DISCRIMINATION. See Taxation, 14.

DISMISSAL. See Appeal and Error, 6; Evidence, 29, 30; Actions, 5.

DISTRICTS. See Schools, 16.

DIVERSE CITIZENSHIP. See Removal of Causes, 6.

DIVERSION. See Waters, 1.

DOMICILE. See Wills, 27, 28.

DORMANT JUDGMENTS. See Appeal and Error, 10.

DOWER.

1. *Dower—Husband and Wife.*—Dower is the life estate to which every married woman is entitled, upon the death of her husband intestate, or in case she shall dissent from his will, to one-third in value of all the lands, tenements and hereditaments, both legal and equitable, of which her husband was beneficially seized, in law or in fact, at any time during coverture, and which the issue, had she any, would have inherited as heir to her husband; and this right is not subject to the claims of his creditors. C. S., 4098. *Chemical Co. v. Walston*, 817.

2. *Same—Debtor and Creditor—Liens—Mortgages—Equity.*—In the settlement of an insolvent estate of a deceased person leaving a widow, where several tracts of land, mortgaged and otherwise, are involved,

DOWER—*Continued.*

the mortgagee of lands insufficient to pay his lien, after a sale subject to the widow's dower, may, as to the balance remaining due, share ratably with other debts to be paid out of the personal property of the decedent, and should any balance be then due him, it is a charge to the extent of the residue unpaid, upon the dower land embraced in his mortgage, but not upon the dower in any other lands; and the widow takes her dower in each tract separately and works out her equity against each mortgagee as he seeks to enforce his mortgage lien. *Ibid.*

3. *Same—Liens—Collateral Security.*—Where the wife joins in the mortgage of her husband on his lands, she conveys her right of dower in the entire tract of land described in the instrument, as a collateral security for the payment of his mortgage debt; and by executing the mortgage her inchoate right of dower is not reduced to the amount of the mortgage debt, and after her husband's death her right of dower extends to the entire tract embraced in the mortgage. *Ibid.*

4. *Same—Administration—Personal Assets.*—Where the wife has executed a mortgage with her husband on his lands and he dies, leaving an insolvent estate, the unsecured creditors are entitled to have the mortgagee exhaust the collateral security by a sale of the excess over the dower of his surviving widow before prorating in the personal estate, reducing the mortgage debt to that extent, and should there then remain anything due on his mortgage debt, it may be collected out of the widow's dower in the lands described in the conveyance. *Ibid.*

5. *Same.*—Where the estate of the deceased husband is insolvent and his widow has joined with him in mortgaging his land, and the sale of the lands is insufficient to pay the mortgage debt, the widow becomes *ipso facto* a creditor of her husband, to the extent of the value of her dower in the lands so sold, not subject to the claims of unsecured creditors of his estate. *Ibid.*

6. *Same—Conversion.*—Where the wife has joined with her husband in mortgaging his lands, the proceeds of the sale of the mortgaged lands after his death, the wife surviving him, to the extent of the value of her dower therein, attaches to the fund arising from said sale, which, *pro hac vice*, is still to be deemed real estate. *Ibid.*

7. *Same—Purchase Money—Mortgages.*—To the extent of a mortgage debt on lands given for the purchase money, and registered at once, the title does not rest in the purchaser for any appreciable time but passes through his hands without stopping and immediately vests in the mortgagee free from a lien of any character existing against the purchaser; and while the *title* of such mortgagee is superior to the widow's dower, she is entitled therein against the rights of other creditors of her deceased husband's estate, *sub modo*, to the value of the lands. *Ibid.*

DRAFTS. See Banks and Banking, 15, 16.

DUE PROCESS OF LAW. See Constitutional Law, 1, 4.

DUTIES. See Ejectment, 3.

DYING DECLARATIONS. See Evidence, 41.

EASEMENTS. See Evidence, 1; Waters, 1.

1. *Easements — User—Evidence—Prescriptive Right—Lost Grant—Pleadings—Profert.*—An easement may be obtained and secured in the lands of an adjoining owner by use and possession, exercised under a claim of right when open, peaceable and adequately continuous, and after a sufficient lapse of time a presumption is raised that it was acquired under a written and sufficient grant which has since been lost, that avoids the rule of pleading requiring profert. *Draper v. Conner*, 18.

2. *Same—Presumptions—Lost Grant.*—In an action to establish a prescriptive right of easement in the lands of an adjoining owner, the doctrine of a lost grant is not precluded as a matter of law if the original deed in a long chain of title refers to the easement as one previously existing, and upon the evidence in this case, *held*, that the evidence of the plaintiff's right by immemorial prescription, as well as by dedication and acceptance, was sufficient to take the issue to the jury. *Ibid.*

3. *Easements — Permissive User — Dedication—Intent—Acceptance.*—The mere permissive user of an easement by the public the owner has maintained on his own land for his sole convenience, will not amount to a dedication, for it is necessary to show that the owner intended to dedicate the easement either by express language, by reservation, or by his conduct. *Ibid.*

4. *Easements—Statutes—Way of Necessity.*—For the owner of lands, cultivating the same, to obtain a way of necessity over the lands of another to a public road, he must show that such way is "necessary, reasonable and just," under the provisions of C. S., 3836; and where it appears, without sufficient denial, that there is a public road leading to the cultivated lands, the petition is properly dismissed. *Rhodes v. Shelton*, 716.

EDUCATION. See Liens, 1; Wills, 22.

EJECTMENT.

1. *Ejectment — Landlord and Tenant — Parties—Leases—Statutes.*—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. C. S., 2365, 2367. *Shelton v. Clinard*, 664.

2. *Same—Title.*—During the continuance of his possession entered upon and in right of the title of his landlord, the tenant is not ordinarily permitted to deny the title under which he had acquired possession, or set up a superior right or title in another. *Ibid.*

3. *Same—Duty of Landlord.*—Where the landlord has leased the premises to another to begin at the expiration of an existing lease, he impliedly obligates the delivery of the possession at the time stated, and to see that the leased premises is then vacated for the occupation by his lessee. *Ibid.*

ELECTION OF BENEFITS. See Wills, 14.

ELECTION OF REMEDIES. See Courts, 1; Guardian and Ward, 1.

ELECTIONS. See Schools, 2, 8; Counties, 1.

Elections—Injunctions—Irregularities—Appeal and Error.—Mere irregularities in conducting an election wherein the electors are not responsible, such as failing to properly inquire into matters concerning their qualification to vote, and the administering the oath when such right has been questioned, is not sufficient on appeal to disturb the finding of fact by the trial judge upon conflicting evidence, that a sufficient number of duly qualified voters had voted in favor of the issue; or when the result of the election would not have been changed. *Plott v. Comrs.*, 126.

ELECTRICITY. See Negligence, 8.

EMBEZZLEMENT. See Banks and Banking, 5.

EMINENT DOMAIN. See Removal of Causes, 8.

EMPLOYER AND EMPLOYEE. See Injunctions, 2; Railroads, 11, 15; Contracts, 14; Negligence, 5; Evidence, 40, 43.

1. *Employer and Employee — Master and Servant — Negligence—Simple Tools—Proximate Cause.*—In order for the employee to recover of his employer damages for the latter's failure to supply simple tools and appliances for the performance of the work required of him, the plaintiff must show that the defendant had failed in the discharge of this duty, and that from the failure of the defendant therein some appreciable and substantial injury to the plaintiff may reasonably have been expected to occur, and that the consequent injury was proximately caused by the defendant's default therein. *Whitt v. Rand*, 805.

2. *Same — Assumption of Risks — Evidence — Nonsuit—Statutes—Appeal and Error—Trials—Questions for Jury.*—In an action to recover damages against his employer for his failure to furnish the plaintiff goggles, or glasses, for the protection of the plaintiff's eyes in chiseling off a portion of a concrete bridge, in pursuance of his employment, there was evidence tending to show that under the existing circumstances the defendant's custom was to furnish them, and at plaintiff's request the defendant's foreman had promised to do so; and, relying thereon, the plaintiff continued at his work for several hours, when a flying particle of the concrete from the plaintiff's chisel caused the injury in suit: *Held*, upon defendant's motion as of nonsuit, the evidence was sufficient to take the case to the jury upon the issue of negligence and assumption of risk. *Ibid.*

3. *Same—Custom—Instruction.*—Where, in an employee's action to recover of his employer damages for the latter's failure in his duty to furnish the former a tool or appliance reasonably necessary for the plaintiff's protection in doing the work required of him, an instruction that makes the defendant's liability solely depend upon his custom to furnish the appliance under the circumstances, without reference to the proximate cause of the injury, under conflicting evidence thereof, is reversible error. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

4. *Employer and Employee—Master and Servant—Evidence—Safe Place to Work—Appeal and Error—Objections and Exceptions.*—The requirement that an employer furnish his employee a reasonably safe place and reasonably safe appliances to perform dangerous services in the course of his employment is not confined to the rule that the employer furnish him with appliances that are known, approved and in general use, and when the evidence is competent on the general duty of the employer in this respect, its admission will not be held for error, when exception is broadly made without particularizing or separating the objectionable part. *Dellinger v. Building Co.*, 845.

ENDORSEMENT. See Bills and Notes, 1; Guardian and Ward, 2.

ENTIRETY. See Estates, 2.

EQUITY. See Bills and Notes, 4; Fraud, 1; Evidence, 10; Pleadings, 4, 6; Principal and Surety, 1; Appeal and Error, 8; Actions, 3; Injunctions, 6, 7, 9, 12; Contracts, 9; Mortgages, 4; Wills, 16; Municipal Corporations, 5; Tenancy in Common, 7; Dower, 2.

1. *Equity—Specific Performance—Contracts—Personal Property—Vendor and Purchaser—Coöperative Marketing.*—Injuries from the breach of contract by a member with the Coöperative Tobacco Marketing Association, formed under the provisions of chapter 87, Public Laws of 1921, to market his tobacco, etc., cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. *Tobacco Assn. v. Battle*, 260.

2. *Equity—Mortgages—Subrogation.*—A stranger to a mortgage who has paid off the mortgage debt under an agreement with the mortgagee that he is to be substituted to the rights of the latter, is not a mere volunteer who will be denied the equitable right of conventional subrogation to the rights of the mortgage creditor, and he is entitled to be subrogated to the mortgagee's rights, and to enforce the mortgage against subsequent parties in interest. *Grantham v. Nunn*, 394.

3. *Same—Assumption of Mortgage Debt.*—One who purchases from the mortgagor his equity of redemption under an agreement that he will assume and pay the mortgage debt, becomes personally liable for the debt he has thus assumed. *Ibid.*

4. *Same — Registration — Notice.*—A purchaser at the foreclosure sale under a second mortgage takes with implied notice of the indebtedness secured by the prior registered mortgage, and where one or several of the notes therein secured has been paid by one who is entitled to subrogation to the first mortgagee's rights, and none of the parties in interest have appealed from a judgment in the purchaser's suit denying this right, there is no equity existing in appellant's favor, the other parties being presumed to have acquiesced therein, and the judgment will not be disturbed. *Ibid.*

5. *Same—Subrogation Pro Tanto.*—Where a mortgage on lands secures several notes maturing at different dates, and one or several of them have been paid by a stranger under agreement with the mortgagee whereunder he is entitled to subrogation *pro tanto* to his rights, the purchaser at foreclosure sale under a second mortgage, claiming only

EQUITY—*Continued.*

under the mortgagor's equity, cannot successfully rely upon the equitable principle that the subrogation will not apply unless the other notes secured by the first mortgage has been paid in full. *Ibid.*

ESTATES. See Constitutional Law, 1; Wills, 1, 7, 11, 13, 15, 16, 21, 25; Guardian and Ward, 3; Mortgages, 2; Deeds and Conveyances, 10, 12.

1. *Estates—Contingent Remainders—Title—Wills—Devises.*—Where a testatrix devises certain of her lands to her two sons for life, with remainder to the one dying leaving issue, and should both die without issue, the title to the lands to revert to the testatrix's nearest of living kin, with a clause leaving the residue of her estate, if any, after taking out the specific devises, to be divided among her two sons: *Held,* though the testatrix's two sons were her nearest of kin, they did not take the lands specifically devised to them by descent, but under the will, and the contingency not having happened upon which they acquired the absolute fee-simple title to these lands, their contract to convey the indefeasible title thereto was not enforceable. *Winslow v. Speight,* 248.

2. *Estates — Husband and Wife — Entireties—Judgments—Liens—Execution.*—Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties and execution may be issued against them. *Martin v. Lewis,* 473.

3. *Estates—Contingent Remainders—Rule in Shelley's Case—Wills—Devises—Title.*—A devise of an estate for life, "and to her heirs if at her death she should leave any, and if not," with limitation over: *Held,* the first taker acquired thereunder a fee-simple title, defeasible in the event she left no heirs, under the rule in *Shelley's case;* and where the ulterior remainderman has conveyed his title to the first taker, any defect as to her having acquired an absolute fee-simple title is cured. *Walker v. Butner,* 535.

4. *Estates — Wills — Devise—Tenancy in Common—Remainders.*—A "bequest" of lands to a daughter of the testatrix, her "children, her heirs and assigns": *Held,* the use of the words "her heirs" after the word "children" does not by construction eliminate the effect of the use of the word "children," or give the life tenant a fee-simple title, but she and her children living at the time of the death of the testatrix take the lands as tenants in common. *Snowden v. Snowden,* 539.

5. *Estates — Remainder — Partition—Statutes—Contingent Remainders—Clerk's Jurisdiction—Appeal—Superior Courts.*—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of C. S., 3215, and these proceedings so brought cannot be validated by derivative jurisdiction in the Superior Court, on appeal, under the provisions of C. S., 1744, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements, for the protection of contingent remaindermen, which must be strictly followed; and, though under C. S., 3234, 3235, a sale is provided when the land is affected with contingent interest in re-

ESTATES—*Continued.*

mainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. *Ray v. Poole*, 749.

ESTOPPEL. See Contracts, 18; Appeal and Error, 17; Tenancy in Common, 9.

EVIDENCE. See Banks and Banking, 6, 9; Bills and Notes, 1, 6; Carriers, 2, 4, 5, 7, 8; Criminal Law, 3, 6, 11, 16, 18, 19, 21, 22; Injunctions, 7, 8, 9; Fraud, 3; Easements, 1; Homicide, 1, 4, 5, 6; Negligence, 1, 3, 4, 7, 9; Railroads, 2, 11; Tenancy in Common, 3; Wills, 3, 4, 20; Admiralty, 1, 2; Guardian and Ward, 2, 5; New Trials, 2; Principal and Surety, 2; Contracts, 5, 15, 19, 22; Pleadings, 20; Statute of Frauds, 1; Mortgages, 3; Partnership, 1, 4; Principal and Agent, 4; Liens, 7; Instructions, 6; Fires, 2; Appeal and Error, 20; Habeas Corpus, 2; Corporations, 5; Jury, 8; Vendor and Purchaser, 4; Employer and Employee, 2, 4; Constitutional Law, 3, 15.

1. *Evidence — Easements — Questions for Jury.* — Where there is more than a scintilla of evidence tending to show the plaintiff's right of easement in adjoining lands, either by grant, prescription or dedication to and acceptance by a municipality, the question should be submitted to the jury. *Draper v. Conner*, 18.

2. *Evidence — Nonsuit.*—Upon a motion to nonsuit, the evidence is considered in the light most favorable to the plaintiff. *Gentry v. Gentry*, 29.

3. *Evidence—Nonsuit.*—On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and reasonable inference to be drawn therefrom. C. S., 567. *Oil Co. v. Hunt*, 157.

4. *Evidence—Directing Verdict.*—Upon plaintiff's motion for a direction of the verdict upon the evidence, the evidence will be taken in the light most favorable to the defendant, giving him the benefit of all reasonable inferences therefrom. *Forbes v. Deans*, 164.

5. *Evidence—Demurrer.*—The plaintiff's evidence must be accepted as true and in the light most favorable to him, upon defendant's motion as of nonsuit. *Anderson v. Express Co.*, 171.

6. *Evidence—Contracts—Written Instruments—Ambiguity.*—A latent ambiguity in the description of a deed or contract to convey lands may be aided by parol evidence to fit the land to the description. *Green v. Harshaw*, 214.

7. *Same — Deeds and Conveyances — Description — Statute of Frauds.*— Where the owners of land have entered into a writing sufficient under the statute of frauds to make a binding obligation upon them to convey it, and to sustain a suit for specific performance, a description of a tract of land known by a certain name and containing a certain number of acres may be shown by parol to include certain dwellings on lands that had been used in connection therewith, and contained within the acreage and boundaries of the lands known by the name designated, and apparently included in the consideration agreed upon by the parties. *Ibid.*

EVIDENCE—*Continued.*

8. *Same—Fraud—Mistake.*—Where the owners of lands have agreed to convey them in a writing sufficient under the statute of frauds, they will be bound to specifically perform it, and objection that the deed tendered by them, which did not conform to the description in the contract, could not be set aside except for fraud or mistake, is untenable. *Ibid.*

9. *Same—Principal and Agent.*—Evidence is held sufficient in this case to be submitted to the jury upon the question of agency and ratification by the principal in the execution of a written agreement, which tends to show that the principal had desired to sell her interest in the land under the contract, had participated therein, and had afterwards received her proportionate part of the consideration. *Ibid.*

10. *Same — Specific Performance — Equity — Burden of Proof—Trials.*—Where the owners of land have entered into a sufficient writing under the statute of frauds to sustain a suit for specific performance of a contract to convey land, and there is no element of fraud or mutual mistake involved in the written contract to convey, and the defendants have tendered a deed conveying only a part of the land contracted for, the plaintiffs seeking this relief have only the burden of satisfying the jury of their demand for the relief sought by the greater weight of the evidence. *Ibid.*

11. *Same—Principal and Agent—Parol Evidence.*—Parol evidence of agency for the sale of land is only competent where the written contract contains a latent ambiguity, and is inadmissible to vary, alter or contradict the unambiguous terms of the written instrument. *Ibid.*

12. *Evidence—Questions for Jury—Trials.*—Where there is more than a scintilla of evidence to support plaintiff's claim, an issue of fact is presented which is for the jury to determine and not a matter of law for the court. *Finance Co. v. Cotton Mills Co.*, 233.

13. *Evidence—Witnesses—Expert Opinion—Cross-Examination.*—Where an expert witness has given his testimony upon evidence he obtained as a result of his personal investigation, it is not reversible error to admit his opinion thereon without first requiring him to state the evidence upon which it is hypothecated, under the modern doctrine, for these are matters to be brought out on cross-examination. *S. v. Hightower*, 300.

14. *Same—Opinion Evidence Upon the Issues.*—An expert witness may not invade the province of the jury by testifying to his opinion upon an issue of facts to be determined by the jury upon the evidence on the trial. *Ibid.*

15. *Same—Appeal and Error.*—It is reversible error to deny the defendant the right of cross-examination of an expert witness, whose testimony, in an action for the commission of a felony, has been received against him upon the trial, or to introduce evidence tending to disprove the facts upon which the expert opinions were based. *Ibid.*

16. *Same — Banks and Banking — Officers — Deposits—Insolvency.*—In an action to convict an officer of a bank for receiving or permitting an employee to receive deposits at a time he knew of the insolvency of a State bank (chapter 4, Public Laws 1921), the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency. *Ibid.*

EVIDENCE—*Continued.*

17. *Same—Knowledge.*—In an action to convict under chapter 4, Public Laws 1921, an officer of a bank for receiving, etc., deposits therein at a time he knew of its insolvency, the question as to his knowledge is ordinarily to be determined with reference to a variety of facts and circumstances, and in defense it is permitted him to go into an investigation of the assets and property of the bank at the date of the deposits, and their value at that time or thereafter, when bearing upon their worth at the time they were charged to have been unlawfully received. *Ibid.*

18. *Same.*—Where the defendant is tried as an officer of a bank for unlawfully receiving deposits of the bank, or permitting them to be received, in violation of chapter 4, Public Laws 1921, and the State Bank Examiner and another expert have been permitted to give their testimony as to its insolvency at the time upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. *Ibid.*

19. *Evidence — Expert Opinion—Handwriting—Criminal Law—Larceny.*—Where relevant to the inquiry in a criminal action for the stealing of an automobile to show that the accused was present in a certain city at the time thereof, which the defendant denied, and has offered evidence to the contrary, it is competent for a witness to offer in evidence a leaf cut by himself from a hotel register indicating the name of the hotel and dates of registration of guests, with the surname of the accused entered thereon under the date of the commission of the crime, and to testify that it was a leaf from the hotel register then kept for the registration of guests, with an entry of one under the surname of the accused, but with different initials, and, under C. S., 1784, for experts in handwriting, by comparison, to testify their opinion that the person who made the entry on the hotel register was the same as the one who signed certain papers introduced upon the trial and admitted to be in the handwriting of the accused. *S. v. Hendricks*, 327.

20. *Evidence—Nonsuit—Motions.*—Upon defendant's motion to nonsuit, the evidence will be construed in the light most favorable to the plaintiff. *Harvey v. Brown*, 362.

21. *Same—Deeds and Conveyances—Mortgages—Fraud.*—Where the mortgagee takes a mortgage in good faith, without notice of fraud alleged in prior negotiations respecting the lands conveyed by him under foreclosure sale to an innocent purchaser without notice, the mortgagee's deed will convey a good title. *Ibid.*

22. *Evidence — Witnesses — Voluntary Statements — Motions—Appeal and Error—Objections and Exceptions.*—Incompetent evidence, voluntarily given by a witness and not elicited by the question asked him, should be stricken out, on motion of the objecting party, but his mere exception is insufficient. *S. v. Green*, 466.

23. *Same — Intoxicating Liquor — Harmless Error.*—There was evidence, upon the trial for illicit distilling, that upon information received the officers of the law discovered the defendant engaged in the un-

EVIDENCE—*Continued.*

lawful manufacture of whiskey: *Held*, evidence of how the officers made this discovery, if erroneously admitted, was harmless error. *Ibid.*

24. *Evidence—Character—Intoxicating Liquor.*—Where a witness to the character of another of defendant's witnesses, upon trial for violation of the prohibition law, has testified that the witness's character was good, as far as he knew, it is not reversible error to defendant's prejudice for him to add that he did not think it bad character to buy a little whiskey, under an admission that the one concerning whose character he was testifying had gone into the woods with another for that purpose. *Ibid.*

25. *Evidence—Witnesses—Interest—Instructions.*—An instruction, upon the trial of defendant, for unlawfully manufacturing whiskey, when he and his relatives had testified in his behalf, that they should receive their testimony with caution and scrutiny, but if the jury were satisfied that they were telling the truth, it would be their duty to give it the same credit as that of disinterested witnesses, is not objectionable. *Ibid.*

26. *Evidence — Corroboration—Witnesses—Impeachment.*—Where plaintiff, a witness in his own behalf, on cross-examination, is sought to be impeached by the question if, during a certain period, he had not left the State as a fugitive from justice, it is competent for him, in corroboration of his testimony, to introduce his certificate of honorable discharge from the army after serving in the World War for that period. *Leonard v. Davis*, 471.

27. *Same—Appeal and Error—Motions to Strike Out—Objections and Exceptions.*—Where the evidence introduced upon the trial is competent in corroboration only, the objecting party must aptly request its restriction to that purpose, and he may not otherwise successfully sustain his exception to its competency as substantive evidence. *Ibid.*

28. *Evidence—Motions—Nonsuit—Statutes—Waiver.*—Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first exception, and it is not subject to review in the Supreme Court on appeal. C. S., 4643. *S. v. Hayes*, 490.

29. *Evidence—Criminal Law—Demurrer—Motion to Dismiss—Statutes—Appeal and Error.*—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of C. S., 4235, and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. C. S., 4643. *S. v. Williams*, 492.

30. *Evidence—Motions—Dismissal—Demurrer.*—Upon a motion to dismiss a civil action as in case of nonsuit, the evidence is construed in the light most favorable to the plaintiff as in case of demurrer thereto. *Montgomery v. Lewis*, 577.

EVIDENCE—*Continued.*

31. *Evidence—Compromise—Admissions.*—While evidence of a compromise of a civil action is ordinarily rejected upon the trial, this principle is inapplicable when the party has throughout unequivocally asserted his original position, and the evidence objected to is of an admission of an independent fact, material to the inquiry. *Ibid.*

32. *Evidence — Fraud— Damages—Written Instruments—Correction—Burden of roof—Quantum of Proof.*—An action to recover damages for the fraud of the grantee in knowingly taking advantage of the plaintiff's mistake, or that of his draftsman, in including in his deed a lot of land that neither he nor his grantee had contemplated, does not require clear, cogent and convincing proof, as in instances where the instrument itself is sought to be corrected, etc., but only to satisfy the jury by the preponderance of the evidence. *Ibid.*

33. *Evidence — Criminal Law—Stenographer—Witnesses—Former Trial.*—Where the prisoner is being again tried for a capital felony resulting from a former mistrial of the same offense, and on the second trial a witness whose testimony on her direct examination is claimed to be material to the defense cannot be procured, the testimony of the stenographer who had taken the evidence of this witness on the former trial is incompetent, upon the State's exception, when he can only give the substance of the direct examination, but not of the cross-examination, in the absence of his stenographic notes, which had been destroyed, with which to refresh his memory. *S. v. Levy*, 582.

34. *Evidence—Declarations—Boundaries.*—A distinction should be observed between hearsay evidence and evidence by reputation as to boundaries of land in dispute in an action, the latter applying only to ancient boundaries, and the former to declarations of deceased persons as to boundaries of more recent origin, it being required as to both kinds of evidence of this character that the declarations come from a disinterested person, *ante litem motam*, and the death of the declarant, who therefore is unable to be produced as a witness at the trial; and such declarations, made after the controversy arose, not merely before suit was brought, when the declarant is not shown to be a disinterested person, is reversible error. *Corbett v. Hawes*, 653.

35. *Evidence — Homicide — Criminal Law — Independent Acts — Motive.*—Where there is evidence tending to show that the defendant strangled to death his illegitimate child soon after it was born alive, it is competent to show his intimacy and misconduct with its mother, when relevant, as tending to prove the *quo animo* or guilty knowledge or motive for the crime. *S. v. Ashburn*, 718.

36. *Evidence — Criminal Law — Accomplice — Instructions.*—A verdict of murder will be sustained upon the unsupported testimony of an accomplice in the crime when, having been instructed by the judge to receive it with caution, owing to the great interest of the witness, the jury have found it sufficient. *Ibid.*

37. *Evidence—Trials—Nonsuit—Questions for Jury—Statutes.*—Upon motion of defendant to nonsuit, considering the evidence in the light most favorable to the plaintiff (C. S., 567): *Held*, the evidence in this case was sufficient for the jury to find the issue of actionable negligence for the plaintiff, and to deny the motion. *Wallace v. Squires*, 186 N. C., 339. *Allen v. Garibaldi*, 798.

EVIDENCE—*Continued.*

38. *Evidence — Appeal and Error — Objections and Exceptions—Motions—Mistrials—Venire de Novo.*—Where the defendant's exception to the admissibility of evidence is sustained, he may not successfully contend on appeal that the suggestion in the question prejudiced him with the jury, though it was unanswered by the witness, his remedy being by motion for a mistrial, or *venire de novo* in the Superior Court. *Ibid.*

39. *Evidence — Corroboration — Appeal and Error.* — Evidence material in corroboration of substantive evidence theretofore admitted on the trial is competent. *Anderson v. Nichols*, 808.

40. *Evidence — Negligence — Employer and Employee — Master and Servant.*—In the employee's action to recover damages of his employer, alleged to have been caused by the negligence of the latter's vice-principal by using an insecure appliance in connection with a power-driven cable, which approximately caused the injury in suit, it is competent to show, by a conversation between plaintiff's fellow-servant and the vice-principal, in plaintiff's presence and hearing, that previous to the occurrence the vice-principal had been put upon notice that the implement he was using was dangerous to the plaintiff in the performance of his duties. *Killian v. Andrews*, 810.

41. *Evidence—Civil Actions—Dying Declarations—Wrongful Death—Negligence—Statutes.*—In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused, to be admissible upon the trial in an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was *in extremis*, or under a sense of impending death, and confined to the act of killing and the attendant circumstances forming a part of the *res jestæ*. C. S., 160. *Dellinger v. Building Co.*, 845.

42. *Evidence—Witnesses—Impeachment—Corroboration.*—Where a witness has testified in his direct examination to competent substantive evidence, and his statement has been impeached or questioned on his cross-examination, it is competent for him to testify on his redirect examination to matters in corroboration of his former testimony that would not otherwise have been admissible; and where the plaintiff, in his action to recover for the wrongful death of his intestate, has testified to his physical condition, competent upon the issue of damages, he may testify, on his redirect examination, after the cross-examination has sought to impeach this statement, that his intestate had been accepted and had served in the United States Army four or five months, when confined to the personal knowledge of the witness of the fact. *Ibid.*

43. *Evidence—Negligence—Res Ipsa Loquitur—Burden of Proof—Contributory Negligence—Instructions—Employer and Employee—Master and Servant—Fellow-Servants.*—Where there is evidence tending to show that the death of the plaintiff's intestate was caused in the course of his employment, by the falling of a derrick the defendant had furnished him to perform his duties, this may be considered by the jury as a circumstance from which they may infer defendant's actionable negligence in furnishing a defective or insufficient or insecure appliance, under the doctrine of *res ipsa loquitur*, the burden of proof

EVIDENCE—*Continued.*

remaining on the plaintiff, and the correctness of an instruction to that effect is not necessarily impaired by evidence tending to show negligence on the part of the intestate or of his fellow-servants. *Ibid.*

EVIDENCE ALIUNDE. See Principal and Agent, 1, 6.

EXAMINATION. See Deeds and Conveyances, 8; Wills, 24.

EXCUSABLE HOMICIDE. See Criminal Law, 10.

EXECUTION. See Wills, 2; Railroads, 8; Appeal and Error, 10; Estates, 2.

EXECUTORS AND ADMINISTRATORS. See Negligence, 2; Wills, 1, 7.

Executors and Administrators—Letters of Administration—Petition to Vacate—Procedure.—Where letters of administration have been granted upon the estate of a decedent by the clerks of the court of two different counties, it is a proper procedure to petition one of these clerks to vacate the letters granted by the other; and where his order allowing the prayer of the petition finds both the facts and intent of domicile to have been within the county wherein the petition was filed, his ruling will be upheld. *In re Ryan*, 569.

EXPENSES. See Principal and Agent, 4.

FEDERAL COURTS. See Removal of Causes, 6.

FEDERAL EMPLOYERS' LIABILITY ACT. See Constitutional Law, 2; Pleadings, 1; Statutes, 1; New Trials, 2.

FEDERAL QUESTIONS. See Railroads, 8.

FEDERAL STATUTES. See Admiralty, 2.

FEE SIMPLE. See Wills, 7; Deeds and Conveyances, 13.

FELLOW-SERVANT. See Evidence, 43.

FELONY. See Jury, 6.

FINDINGS. See Injunctions, 3, 4, 8; Appeal and Error, 8, 10, 11; Judgments, 4; Habeas Corpus, 2; Wills, 27.

FIRES. See Admiralty, 2.

1. *Fires — Trespass — Damages—Title—Vendor and Purchaser.*—It is not required that the purchaser of land should have acquired at least the equitable title before the injury to maintain his action against his vendor for negligently setting fire to the land, which trespass continued after he had acquired the title; and an instruction that he could not recover in his action unless he were at least the equitable owner at the time of the origin of the fire is reversible error. *Matthews v. Lumber Co.*, 651.

2. *Fires—Criminal Law—Evidence—Motive—Landlord and Tenant—Automobiles — License — Identification.*—Upon the trial of defendant for setting fire to his tenant's house at night, evidence *held* sufficient to sustain a verdict of guilty which tended to show ill-will on the part of the defendant for his tenant, that an automobile was seen about

FIRES—*Continued.*

the time of the fire in front of the tenant's house, afterwards identified as that of the defendant by the peculiar marking of the imprint on the ground of its tires, and by the license number; and testimony of witnesses was properly admitted which tended to show that by experiments made shortly thereafter a witness to the fact could have seen the number on the car under the circumstances, and that the imprint of the tracks of defendant's automobile were identical with those made by the one the witness had seen there when the experiments were made, in the absence of defendant and without having notified him to be present. *S. v. Young*, 698.

FIRE INSURANCE. See Insurance. 1.

FLOWAGE. See Waters, 1.

FORECLOSURE. See Municipal Corporations, 2.

FRAUD. See Deeds and Conveyances, 1, 2, 8; Bills and Notes, 5; Evidence, 8, 21, 32; Principal and Surety, 1; Vendor and Purchaser, 1; Contracts, 4, 5; Mortgages, 3, 4, 5; Banks and Banking, 12.

1. *Fraud—Definition—Equity.*—Fraud, actual and constructive, is so multiform as to admit of no general rules or definitions, and it is no part of equity doctrine to define it. *Oil Co. v. Hunt*, 157.

2. *Same—Debtor and Creditor—Mortgages—Judgments—unsecured Creditors.*—Evidence in this case that one conducting a small store gave certain creditors of his mercantile business mortgages in comparatively large sums to secure a preëxisting debt, and that while the store had been closed for some time, a fire occurred, etc., *is held* sufficient in a judgment creditor's suit to set aside the mortgages as to the unsecured debts, and show that they had been given and received with the intent to defraud those who were not thus secured in their debts against the owner. *Ibid.*

3. *Fraud—Evidence—Deeds and Conveyances—Mortgages—Sales.*—Where a deed to a purchaser at a foreclosure sale under a mortgage and preceding conveyances in relation thereto are sought to be set aside for fraud, testimony of a witness of his opinion as to the facts constituting the alleged fraud of the mortgagee, or otherwise than by his admission, is incompetent. *Harvey v. Brown*, 362.

GAMING.

Gaming—Money Received—Contracts—Stocks—Margin—Actions.—Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased: *Held*, the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and C. S., 2144, relating to gambling, etc., is not available to the defendant as a defense. *Gladstone v. Swaim*, 712.

GARAGE. See Taxation, 11.

GOOD FAITH. See Removal of Causes, 1.

GOVERNMENT. See Railroads, 8; Taxation, 8; Municipal Corporations, 7.

GRADE CROSSINGS. See Negligence, 3.

GUARDIAN AND WARD. See Constitutional Law, 7.

1. *Guardian and Ward — Settlement — Receipt—Acquittance—Election of Remedies.*—Where the general guardian has appealed in condemnation proceedings to the Superior Court from an assessment made of the value of his ward's land, and has in good faith agreed upon the value at a much better price, which was paid and incorporated specifically in the final settlement with his ward, who, aware of the circumstances, had accepted it and given a full acquittance in writing, in her action against the city, brought nearly two years afterward: *Held*, that she had been put to her election to affirm or disaffirm his action within a reasonable time after reaching her majority, and her testimony that she was unaware that it was included in her acceptance raised an issue of fact for the jury to determine, and it was reversible error for the judge to hold in her favor as a matter of law. *Long v. Rockingham*, 200.

2. *Same—Evidence—Process—Endorsements.*—A receipt and full acquittance by the ward upon coming of age, given to the guardian, are *prima facie* evidence that they spoke the truth. *Ibid.*

3. *Guardian and Ward—Estates—Settlement.*—The general principle that a guardian may discharge himself of his trust as such by turning over to the person lawfully entitled thereto whatever security he may have taken in good faith, as guardian, as a result of the prudent management of his ward's estate, and thus discharge himself of liability, is subject to the exception that there be not special reason existing to the contrary. *Cobb v. Fountain*, 335.

4. *Same—Trusts.*—While the word "trust," in its application to a guardian in the management of his ward's estate, has a more restricted significance, upon his qualification as such, he assumes all the responsibilities of his position and obligates himself to exercise such care and diligence in the management of his ward's estate as a man of ordinary care, prudence and intelligence uses in the management of his own business. *Ibid.*

5. *Same — Presumptions — Prima Facie Case — Evidence—Questions for Jury.*—The complaint in an action against a guardian alleged that he had loaned money of his ward's estate to one beyond the State, and the jurisdiction of our courts, on a note that was long past due and unpaid; and upon demurrer, considered as admitting these allegations, it was *held*, the circumstances of this transaction made out a *prima facie* case that he had not acted with the care or prudence required of him, and raised the issue for the jury to determine. *Ibid.*

HABEAS CORPUS. See Juvenile Courts, 2.

1. *Habeas Corpus — Parent and Child — Judgments—Reopening Case—Motions—Procedure.*—Where, in *habeas corpus* proceedings between husband and wife for the custody of their minor children, an order or judgment has been rendered which reserves the cause for further

HABEAS CORPUS—*Continued.*

orders as changed conditions may require, either party may thereupon petition to have the matter reopened and proceeded with upon notice to the order and upon motion, in accordance with the course and practice of the courts. *Clegg v. Clegg*, 730.

2. *Same—Appeal and Error—Evidence—Findings—Modification of Judgment.*—On appeal from an order or judgment in *habeas corpus* proceedings between husband and wife for the custody of the infant children of the marriage, the facts as found by the judge of the Superior Court are conclusive on appeal when supported by sufficient evidence; and where a material finding does not appear to have been supported by such evidence, the Supreme Court may accordingly change or modify the order of the Superior Court judge, as the welfare of the children may require, under the circumstances presently appearing, and award the custody of the children to each of the parents alternately, requiring the giving of a bond for the observance of the conditions of the judgment or order thus changed or modified. *Ibid.*

HANDWRITING. See Evidence, 19; Intoxicating Liquor, 3.

HARMLESS ERROR. See Evidence, 23.

HEALTH.

Health—Municipal Corporations—Ordinances—Milk—Pasteurization.—An ordinance requiring milk to be pasteurized under reasonable regulations before being sold for human consumption within its limits, and requiring an annual license therefor from the county health officer, is a valid exercise of the police power of a city; and a fine of twenty-five dollars may be imposed upon one violating its provisions. *S. v. Edwards*, 259.

HIGHWAYS. See State Highways, 1; Statutes, 4; Municipal Corporations, 6.

HOMICIDE. See Criminal Law, 16, 18, 19, 22; Evidence, 35; Jury, 6.

1. *Homicide — Criminal Law — Evidence Excluded—Instructions—Appeal and Error.*—Where a prisoner was tried for and has been convicted of murder in the first degree, and there was conflicting evidence that he acted in self-defense, and further that he had acted premeditatedly and with prior malice, it is reversible error for the trial judge to state as a part of the State's contentions certain evidence as to the prisoner's long continued prior malice he had excluded as too remote; and this error is not cured by a further instruction that the law would attribute the motive of the killing to the present provocation and not to preëxisting malice unless it so appeared from the circumstances. *S. v. Love*, 32.

2. *Same—Constitutional Law.*—In an action involving the crime of murder in the first degree, an instruction that refers to a pregnant circumstance to show the previous malice and subsequent premeditation of the prisoner to commit the act, as a fact sworn to but which had been excluded from the evidence, is reversible error in denying to the prisoner his constitutional right to confront the witnesses against him, and to submit them to his cross-examination. Constitution of North Carolina, Art. I, sec. 2. *Ibid.*

HOMICIDE—*Continued.*

3. *Same—Contentions—Objections and Exceptions.*—The rule that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner upon the trial, that had been excluded, tending to show previous malice of the prisoner, vitally necessary upon the question of his premeditation. *Ibid.*

4. *Homicide — Murder — Evidence —Alibi—Instructions.*—The defendant, charged with murder, introduced evidence of an *alibi* which was material to his defense. In his charge to the jury the judge did not refer to this evidence: *Held*, error. C. S., 564. *S. v. Melton*, 481.

5. *Homicide — Criminal Law — Evidence — Verdict—Nonsuit—Statutes—Questions for Jury.*—Evidence that the defendant, while driving his automobile at night at about 30 or 35 miles an hour, along a public highway, without lights, signals, or other warnings of approach, suddenly appeared and struck and killed a lad, going in the opposite direction, who was walking along the edge of the highway in a line with other boys, by turning in and out among them, is sufficient evidence to take the issue of murder to the jury, and to sustain a verdict of manslaughter, and to deny defendant's motion as of nonsuit under the provisions of C. S., 4643. The decisions of reckless driving of automobiles upon the public highways of the State in violation of statute cited and applied. *S. v. Crutchfield*, 607.

6. *Homicide—Evidence—Instructions—Appeal and Error.*—Where, upon the trial for a homicide, the defendant relies only on his evidence to show an *alibi*, and the State's evidence tends to convict him of murder in the second degree, it is not error for the court below to instruct the jury, as a matter of law, that a verdict of guilty of manslaughter could not be returned by them, there being no evidence thereof. *S. v. Ashburn*, 718.

HOSPITALS. See Principal and Agent, 4.

HUSBAND AND WIFE. See Wills, 12, 27; Mortgages, 2; Estates, 2; Deeds and Conveyances, 14; Abandonment, 1; Dower, 1.

1. *Husband and Wife—Widow's Reasonable Support—Statutes—Actions—Issues—Validity of Marriage.*—The effect of C. S., 1667 (amended by chapter 123, Public Laws of 1921), has been changed by statute, chapter 24, Public Laws of 1919, and thereunder it is not now required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees, pending the trial and final determination of the issue relating to the validity of the marriage. *Barbee v. Barbee*, 538.

2. *Same—Death of Husband.*—The right of the wife, in proper instances, for her reasonable support and counsel fees continues only during the lifetime of the husband or the separation of the wife from him, the widow, after his death, having in lieu thereof acquired a widow's right and interest in his property. *Ibid.*

IDENTIFICATION. See Fires, 2.

ILLEGITIMATE CHILDREN. See Actions, 1.

IMMIGRATION. See Criminal Law, 13.

IMPEACHMENT. See Evidence, 26, 42.

IMPRISONMENT. See Constitutional Law, 14.

IMPROVEMENT. See Municipal Corporations, 1, 7, 9.

INCORPORATION. See Municipal Corporations, 6.

INDICTMENT. See Banks and Banking, 3; Courts, 1; Verdict, 1; Negligence, 5.

1. *Indictment—Criminal Law—Banks and Banking—Abstracting Funds of Bank—Bill of Particulars.*—It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of C. S., 4401, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. C. S., 4613. *S. v. Switzer*, 89.

2. *Same—Technicalities.*—An indictment for unlawfully abstracting the funds of a bank, to the injury of persons, corporations, etc., is sufficient if it substantially follows the express wording of the statute (C. S., 4401) in a plain, intelligent and sufficient manner, though without strict regard to form, technicality or refinement. *Ibid.*

INFANTICIDE. See Criminal Law, 22.

INFANTS. See Actions, 2; Criminal Law, 22.

INHERITANCE TAX. See Constitutional Law, 11; Corporations, 1; Taxation, 2.

INJUNCTIONS. See Appeal and Error, 2, 8; Elections, 1; Pleadings, 6; Contracts, 9; Wills, 16; Municipal Corporations, 5; Mortgages, 4.

1. *Injunctions — Actions — Associations—Unincorporated Companies.*—An unincorporated company or association of workmen is not, as such, subject to be sued or the object of injunctive relief. *Citizens Co. v. Typographical Union*, 42.

2. *Same—Employer and Employee—Complaint—Demurrer—Questions for Jury—Trials.*—The individual members of a labor organization may ordinarily combine in their efforts, by peaceful persuasion and picketing, to induce others to quit their employment by uniting with them in ceasing to work for employers, whether corporations or individuals; but the employers and employees have relative rights, the one to the services and the other to render services, free from coercion, intimidation, or other unlawful or threatening influences; and where the complaint states a definite cause of action against individual members of an unincorporated labor organization, a demurrer admits the truth of the relevant and pertinent allegations, and thereupon a temporary injunction, issued upon due notice to show cause, should be continued to the hearing, upon the merits of the cause, for the finding of the facts by the jury. *Ibid.*

3. *Injunction — Appeal and Error—Findings—Review.*—The presumption on appeal to the Supreme Court is in favor of the correctness of the

INJUNCTIONS—*Continued.*

court's findings of fact, upon supporting evidence, in declining to continue a preliminary restraining order to the hearing; and while in injunction proceedings the appellate court is not conclusively bound by such findings of the lower court, they will not be disturbed unless it is made to appear from an inspection of the record that they should be reviewed. *Plott v. Comrs.*, 125.

4. *Same—Additional Findings.*—Exception on appeal from the order of the judge of the Superior Court in proceedings for injunctive relief, denying the plaintiff's application to continue a restraining order to the hearing on the ground that he should have found additional facts, must generally be taken from his refusal of a request for additional findings. *Ibid.*

5. *Injunction—Labor Unions—Unincorporated Companies—Individuals.*—This appeal from the order of the trial judge vacating a restraining order against a labor union and certain individual members thereof is controlled by The Citizens Company against the same Union, *et als.*, *ante*, 47. *Times Co. v. Typographical Union*, 157.

6. *Injunction — Equity — Mortgagor and Mortgagee—Liens—Parties—Co-operative Marketing Associations.*—A preliminary order restraining a member of a coöperative association from disposing of the tobacco embraced in the contract in breach thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation, a position available to the lienee not a party to the action, and the restraining order should be continued to the hearing, safeguarding the rights of the lienee to be asserted by his appropriate action, the defendant being in an attitude of resistance towards the contract and denying any obligations thereunder. *Tobacco Assn. v. Patterson*, 252.

7. *Injunction — Coöperative Marketing — Contracts—Equity—Evidence.*—Where, in the suit of a tobacco marketing association for injunctive relief against the defendant for breaching his contract to market his tobacco with it according to its terms, he resists upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary: *Held*, the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. *Tobacco Assn. v. Battle*, 260.

8. *Injunction—Appeal and Error—Evidence—Findings—Review.*—On appeal from the denial of the continuance of a restraining order the facts as found by the Superior Court judge are not conclusive on the Supreme Court, and the latter may review the evidence appearing in the record. *Ibid.*

9. *Injunction — Usury—Equity—Pleadings—Demurrer—Evidence—Admissions.*—In a suit to enjoin foreclosure of a mortgage upon the ground of usury, a demurrer to the complaint alleging the usurious charge admits its truth, and the injunction is properly continued to the hearing unless the defendant offers to reduce the charges to that allowed by law; and his defense, upon the ground that equity requires the plaintiff to tender the lawful amount of the debt, is untenable. *Adams v. Bank*, 343.

INJUNCTIONS—*Continued.*

10. *Injunction—Mortgages—Liens—Questions for Jury—Appeal and Error.* There was evidence that the intervener, who had acquired from the plaintiff a purchase-money mortgage of defendant on two mules, the subject of claim and delivery, in turn had sold these mules to defendant and took a purchase-money mortgage thereon for the balance of the purchase price, and that thereafter the plaintiff sold defendant another mule, and to secure the balance of the purchase price took a mortgage thereon and on the two mules sold to defendant by the interveners and subject to the latter's mortgage, but registered subsequent thereto: *Held*, an instruction directing a verdict upon the evidence in intervener's favor, in effect that the intervener's mortgage lien was prior to that of plaintiff, was reversible error to the plaintiff's prejudice, its priority and validity to be determined by the jury upon the evidence. *Livestock Co. v. Holland*, 346.

11. *Injunction—Coöperative Marketing Associations.*—In this suit for an injunction by a tobacco growers association, incorporated under the provisions of the statute, against its alleged member for selling his tobacco in violation of his contract, depending largely upon the question of his membership: *Held*, the restraining order should be continued to the hearing under the authority of *Tobacco Assn. v. Battle*, *ante*, 259. *Tobacco Assn. v. Spikes*, 367.

12. *Injunction — Equity—Coöperative Marketing Association—Contracts—Breach.*—In a suit by a coöperative tobacco association, formed under the provisions of Public Laws 1921, ch. 87, seeking injunctive relief against its member for disposing of his tobacco elsewhere than through the plaintiff corporation, in violation of his contract, authorized by the statute, and in collusion with his codefendant, a tobacco warehouse association, in fraud of the plaintiff's contractual rights, an answer of the defendant member, admitting that he had so disposed of his tobacco, and seeking rescission of his contract upon allegation of the plaintiff's fraud and mismanagement and failure to make the returns upon sales of tobacco it had theretofore handled for the member defendant, etc., raises an issue vitally affecting the business of the plaintiff, an adverse decision being likely to work an irreparable injury, and the temporary restraining order theretofore granted should, upon sufficient evidence, be continued to the hearing. *Tobacco Growers Assn. v. Pollock*, 409.

13. *Same—Remedy at Law—Liquidated Damages.*—The fact that the cooperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law for its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purposes for which it was incorporated under the provisions of the statute (chapter 87, Public Laws 1921). *Ibid.*

INNKEEPER. See Constitutional Law, 14.

IN PARI MATERIA. See Statutes, 2, 4; Appeal and Error, 13.

INSANITY. See Judgments, 5.

INSOLVENCY. See Criminal Law, 5; Evidence, 16; Actions, 4.

INSTRUCTIONS. See Appeal and Error, 3, 15; Carriers, 1; Criminal Law, 4, 9, 18, 20; Homicide, 1, 4, 6; Contracts, 6; Intoxicating Liquors, 1, 3; Evidence, 25, 36, 43; Limitation of Actions, 3; Abandonment, 1; Employer and Employee, 3.

1. *Instructions—Appeal and Error.*—Exceptions to a disconnected portion of a charge will not be held for error; when taken in connection with other parts of the charge it correctly applies the law to the evidence upon the trial. *Cherry v. Hodges*, 368.

2. *Instructions—Trials.*—The charge of the court should be construed as a whole, so that all that relates to any phase thereof may be contextually considered, so as to place it in its proper setting; and while an exception to a part thereof, standing alone, may be subject to just exception, it is not ground for error if the charge, properly construed with other relative parts, states the law applicable to the evidence. *In re Hardee*, 381.

3. *Same—Expression of Opinion—Statutes.*—Where there is evidence of fraud and undue influence in the making of a will being caveated, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage to a man who had no property, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge, contrary to the statute. C. S., 564. *Ibid.*

4. *Instruction — Burden of Proof—Conflicting Instructions—Appeal and Error.*—Where the judge, in his charge to the jury, properly places the burden of proof on the defendant, and thereafter improperly places it on the plaintiff, it is reversible error in leaving the jury to determine which portion of the charge was the correct one. *Tobacco Growers Assn. v. Moss*, 421.

5. *Instructions—Appeal and Error.*—An instruction which is correct as to its related parts, upon the matter excepted to, will not be held for reversible error because of a portion thereof, so related, excepted to, if standing alone, is erroneous. *S. v. Valley*, 571.

6. *Instructions—Evidence—Directing Verdict—Appeal and Error.*—In an action to recover upon certain notes, the due execution of which is not in dispute, given by defendants for fertilizer, the defendants offered in evidence a part of the complaint alleging that they owed the plaintiff the full amount of the notes sued on, but the defendants claimed a deduction on account of not having received a certain portion of the goods, etc.: *Held*, the evidence was susceptible of more than one deduction, and it was reversible error to plaintiff's prejudice for the judge to charge the jury, in effect, to allow defendants' claim for the credit, if they "believed the evidence." *Fertilizer Works v. Cox*, 654.

7. *Instructions — Requests — Appeal and Error.*—Where the trial court clearly gives in his charge the full substance of a request for instruction, it is sufficient. *S. v. Ashburn*, 718.

INSTRUCTIONS—*Continued.*

8. *Instructions—Contentions—Appeal and Error.*—An exception to the recital of the contentions of the appellant, contained in the judge's charge, should be taken in time to afford the judge an opportunity to correct them. *Ibid.*

INSURANCE. See Wills, 14; Principal and Agent, 3.

1. *Insurance—Fire Insurance—Policies—Mortgagor and Mortgagee.*—The clause in a standard policy of fire insurance, declaring the contract invalid if a change in the title of the lands shall be made by the mortgagor from that stated in the policy, is made by correct interpretation of the terms of a standard form rider attached to the policy, a separate and distinct insurance of the mortgagee's or trustee's interest therein, by the use of the words "that the mortgagee or trustee shall notify this company of any change of ownership which shall come to the knowledge of said mortgagee or trustee," etc.; and where such change in the title is made by the owner without the knowledge of the mortgagee or trustee, and the acts of the mortgagor that accordingly invalidate the policy as to his rights thereunder do not, at any time after the issuance of the policy, affect the rights of the mortgagee or trustee under the circumstances. *Bank v. Ins. Co.*, 97.

2. *Same—Waiver—Consolidation of Actions—Appeal and Error.*—Where a standard policy of fire insurance has been issued by an insurance company on the buildings of the owner upon the lands described in the policy containing a clause that the insurer shall not be liable for a greater proportion of any loss or damage sustained than the sum thereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise, and, unknown to the mortgagee mentioned in the policy, there has been a change by the owner of his interest, and he has obtained other insurance, without the knowledge or consent of the insurer or meeting the requirements of the policy in that respect, the joining by the mortgagee, whose rights are protected under both policies, in the mortgagor's action to recover for the loss by fire, simultaneously with an action against the former one, for the purpose of ascertaining and adjusting its rights under both policies, is not a ratification of the acts of the owner in taking out the second policy, contrary to the provisions of both of them, and which invalidated the policies, and on this appeal the cause is remanded for the consolidation of both actions, for the adjustment of the rights of the parties according to the provisions of the respective policies. *Ibid.*

INTENT. See Banks and Banking, 3; Deeds and Conveyances, 5, 9, 11; Easements, 3; Wills, 1, 6, 13, 20; Statutes, 2; Criminal Law, 19.

INTEREST. See Criminal Law, 4; Contracts, 3; Partnership, 2; Evidence, 25.

INTERVENER. See Pleadings, 15.

INTERVENING CAUSE. See Negligence, 5, 6.

INTESTACY. See Wills, 17.

INTOXICATING LIQUOR. See Criminal Law, 1, 4; Evidence, 23, 24; Judgments, 11.

1. *Intoxicating Liquor—Spirituous Liquor—Statutes—Possession—Instructions.*—Chapter 1, section 2, Laws 1923, known as the Turlington Act, was expressly to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises; and an instruction to find the defendant guilty under these circumstances, if proved beyond a reasonable doubt, is not erroneous. *S. v. McAllister*, 400.

2. *Same—Verdicts.*—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited under the provisions of the Turlington Act, ch. 1, secs. 2 and 10, Laws 1923. *Ibid.*

3. *Same—Appeal and Error—Instructions—Harmless Error.*—Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, contrary to the provisions of the Turlington Act, an erroneous charge as to receiving and transporting it is harmless error. *Ibid.*

INTRASTATE COMMERCE. See Statutes, 1.

ISSUES. See New Trials, 1; Wills, 8; Evidence, 14; Pleadings, 10, 11, 15; Husband and Wife, 1; Contracts, 21.

JAILS. See Statutes, 3.

JOINDER. See Removal of Causes, 1.

JOINT LIABILITY. See Judgments, 12.

JUDGE. See Pleadings, 9, 14.

JUDGMENTS. See Fraud, 2; Estates, 2; Wills, 2; Summons, 1; Appeal and Error, 4, 5, 6, 9, 11, 16; Railroads, 8; Pleadings, 8, 12, 15; Juvenile Courts, 1; Contracts, 18; Habeas Corpus, 1, 2; Tenancy in Common, 9.

1. *Judgments — Admissions—Conditions—Appeal and Error.*—Where the defendant in an action upon a joint note admits his liability for one-half thereof, and contends he is not further liable under an agreement between himself and the payee, it is reversible error for the trial judge to enter judgment against him for one-half, and ignoring the conditions claimed by him, submit to the jury his liability for the other half. *Fertilizer Co. v. Brock*, 169.

2. *Judgments—Motions to Set Aside—Term—Appeal and Error.*—A judge is without authority to set aside a judgment final by default of an answer, rendered in term, after he has adjourned the court to expire by limitation and has left the county, though without notice given

JUDGMENTS—*Continued.*

of its final adjournment; and in this case, upon the plaintiff's exception to an order thus made, *it is held* the plaintiff's exception is sustained without prejudice to the rights of the defendant to assail the judgment at a subsequent term of court, by motion in the cause or other appropriate remedy. *Dunn v. Taylor*, 385.

3. *Judgments — Motions to Set Aside — Excusable Neglect — Defenses— Statutes.*—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the court can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. C. S., 600. *Bank v. Duke*, 386.

4. *Same—Appeal and Error—Findings of Fact.*—Upon appeal from the refusal of the Superior Court judge to set aside a judgment for excusable neglect, the facts as found by him upon which he has acted are ordinarily conclusive, and his rulings of law only are reviewable. *Ibid.*

5. *Same—Insanity.*—A judgment obtained against one who was *non compos mentis* is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. C. S., 600. *Ibid.*

6. *Same.*—Upon passing upon defendant's motion to set aside a judgment for excusable neglect, upon the ground of his intestate's insanity, it appeared that he was represented on the trial by his counsel, and his depositions read in evidence, and that his friends and relations appeared thereat, and his defense to the action was vigorously made: *Held*, not reversible error for the judge to refuse to pass upon the defendant's insanity at the time of the trial. The statutory provisions protecting the estate of one *non compos mentis*. C. S., 451, 406, commented upon by *Clarkson, J. Ibid.*

7. *Judgments—Pleadings—Default of Answer—Banks and Banking—Deposits—Default and Inquiry—Appeal and Error—New Trial.*—Where the liability of a bank, a codefendant, depends solely upon the amount of money the principal defendant had on deposit at the time of the issuance of the summons, a judgment against the bank by default of an answer should be by default and inquiry, and a judgment by default final, making the bank liable beyond the amount of the deposit, is reversible error. *Pyles v. Pyles*, 486.

8. *Judgments—Pleadings—Default—Motion to Set Aside—Claim and Delivery—Replevin—Principal and Surety.*—A judgment by default for the want of an answer wherein the defendant has replevined personal property in claim and delivery, and cannot restore it, and has since been adjudged a bankrupt, will not be set aside for excusable neglect for the failure of an attorney employed by the defendant to file the answer, or upon the ground that if the property had been returned by defendant it would have been subject to liens superior to the claim of the plaintiff. *Garner v. Quakenbush*, 603.

9. *Judgments — Pleadings — Default — Motions to Set Aside—Excusable Neglect—Meritorious Defense.*—Upon motion to set aside a judgment by default final for the want of an answer upon the ground that it

JUDGMENTS—*Continued.*

should have been by default and inquiry, the movant must show a *prima facie* case entitling him to this relief, or that a different result would probably follow. *Ibid.*

10. *Same—Bankruptcy—Mortgages—Liens—Claim and Delivery—Replevin—Principal and Surety.*—As against the trustee in bankruptcy of a mortgagor of personal property, replevined in claim and delivery by the mortgagor, the surety on replevin bond may show by his evidence on his motion to set aside a judgment by default final for the want of an answer, that the judgment should have been by default and inquiry, upon the ground that the property replevined was insufficient in value to pay off the judgment in the mortgagee's favor. *Semble*, the question as to what extent the other creditors represented by the trustee should otherwise share in the bankrupt's estate is within the jurisdiction of the bankrupt court. *Ibid.*

11. *Judgments Suspended — Conditions Broken — Sentence — Intoxicating Liquors—Criminal Law.*—Where the defendant has been convicted of violating the prohibition law and agrees to and takes advantage of a suspension of a judgment against him, upon a specific condition that a certain sentence authorized by law shall be imposed should he violate the conditions, among others, that he personally and entirely abstain from the use of intoxicating liquors, he cannot be heard to complain, upon the ascertainment by the court that he has violated this condition, that it was unreasonable, or that the sentence agreed upon could not properly be imposed. *S. v. Shepherd*, 609.

12. *Judgments—Pleadings—Actions—Joint Liability—Default—Several Defendants—Statutes.*—Where action is brought, to recover for goods sold and delivered, against several defendants jointly, and the complaint has been duly served on them all, the plaintiff is entitled to judgment by default before the clerk against one or more of the defendants who have failed to answer or demur within the twenty days after service of the complaint. Subsections 3 and 11, section 1, chapter 92, Extra Session, Public Laws 1921. *Brooks v. White*, 656.

13. *Same—Appeal—Courts—Jurisdiction.*—Where the clerk of the court has entered judgment by default for the want of an answer against one or more of defendants in failing to file answer or demurrer, under the provisions of subsections 3 and 11, section 1, chapter 92, Extra Session 1921, the defendants against whom the judgment has been rendered may on appeal apply to the judge for an extension of time. *Ibid.*

14. *Same—Waiver.*—Where the plaintiff is entitled to judgment by default of pleadings in an action against several joint defendants, his taking a judgment against one or more of them is not a waiver of his right to such judgment against the others. *Ibid.*

15. *Same—Default and Inquiry—Appeal and Error.*—C. S., 595, 596, 597, govern the taking of judgments by default for want of answer or demurrer, under the provisions of Public Laws, Extra Session 1921, subsecs. 3 and 11, sec. 1, ch. 92, and it is erroneous for the clerk to enter a judgment by default final when it appears from the complaint that the action is to recover upon an unpaid disputed balance of an

JUDGMENTS—*Continued.*

open account for goods sold and delivered, it being only proper for a judgment by default and inquiry, the amount to be determined by the jury upon the evidence. *Ibid.*

JURISDICTION. See Railroads, 5, 8; Corporations, 2; Pleadings, 8, 13; Courts, 2; Summons, 1; Juvenile Courts, 4; Removal of Causes, 3, 7; Judgments, 13; Sales, 1; Estates, 5; Tenancy in Common, 6, 8.

JURORS. See Jury.

JURY. See Criminal Law, 6, 17; Courts, 3.

1. *Jurors—Challenge—Poll Classification.*—Peremptory challenges to individual jurors or challenges to the poll are now, generally speaking, divided into two classes, *propter defectum*, or the lack of some legal requirement, and *propter affectum*, which goes to the juror's bias or partiality of the juror, of which either party at the trial may take advantage. The principal challenges are stated by STACY, J. *S. v. Levy*, 582.

2. *Same — Objections and Exceptions — Appeal and Error.* — Before the challenging party to the individual juror is entitled to have the adverse ruling of the trial court passed upon on appeal, it is required that he should have exhausted his peremptory challenges, and upon objection made in apt time. *Ibid.*

3. *Same—Courts—Discretion.*—In the trial of capital felonies the juror must be challenged by the party when he is brought to the book to be sworn; and when it later appears that the juror is incompetent, it is discretionary with the trial judge not to subject to review on appeal whether he will, under the circumstances, order a new trial. *Ibid.*

4. *Jurors — Qualification — Statutes — Challenges.*—Where a juror has a civil action calendared for the term and continued in the discretion of the trial judge, it is not objectionable that he be permitted by the court to sit as a juror in a criminal action at the same term, the reason of the statute (C. S., 2316) for the disqualification being removed. *S. v. Ashburn*, 717.

5. *Same—Several Defendants—Criminal Law.*—Where two or more defendants are being tried for the same crime, and, upon challenge for cause by one of them, the juror is stood aside upon cause admitted by the State, the other defendant who desires the juror to sit has no legal ground of complaint. *Ibid.*

6. *Same—Homicide—Felonies.*—The effect of C. S., 2325, was to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and C. S., 4634, abolishing the established practice permitting the solicitor to place jurors, upon the trial of a capital felony, at the foot of the panel, does not affect the application of C. S., 2325, to the trial of such felonies. *Ibid.*

7. *Same—Interpretation of Statutes.*—The legislative intent in the enactment of C. S., 4633, providing twelve peremptory challenges for the defendant tried for a capital felony, and in other criminal cases four

JURY—*Continued.*

peremptory challenges, and requiring the clerk to read over beforehand the names of the jurors in the panel, in the presence and hearing of the defendants and their counsel, etc., is to secure a reasonable and impartial verdict. *Ibid.*

8. *Same—Trials—State's Evidence.*—Where the defendant in a criminal action has selected her jury, and thereafter has entered a plea of guilty and become a witness against her codefendant, being tried for the same offense, she is within her statutory right in exercising such right, and her codefendant may not sustain his exception thereto. *Ibid.*

JUS ACCRESCENDI. See Wills, 12.

JUVENILE COURTS.

1. *Juvenile Courts — Judgments — Appeal and Error — Statutes.*—Public Laws 1919, now C. S., ch. 90, art. 2, secs. 5-39 *et seq.*, are valid constitutional provisions for the uncared-for and destitute children of the State, under certain administrative and judicial powers conferred upon the clerks of the Superior Court, etc., as juvenile courts with power to initiate and examine and pass upon cases coming within the statutory provisions; and where, following the statutory procedure, these juvenile courts have determined and adjudged that a certain child comes within their jurisdiction, such action is within the judicial powers conferred, and fixes the status of the child as a ward of the State, and the condition continues until the child becomes of age, unless and until such adjudication is modified or reversed by further judgment of the juvenile court or by the judge of the Superior Court hearing the case on appeal as the statute provides. C. S., 5058, 5039, 5054. *In re Coston*, 509.

2. *Same—Habeas Corpus.*—The statutory remedy by appeal being provided from the determination of the juvenile court from its judgment that a certain child comes within the statutory provisions, and the status of the child has been ascertained by the juvenile court as being that of a ward of the State, the writ of *habeas corpus* is not available to the parent or other claiming the child, unless in rare and exceptional cases wherein the welfare of the child has not been properly provided for. C. S., 5454. *Ibid.*

3. *Same—Parent and Child—Notice.*—Where the juvenile court has examined into the condition of a child, and has adjudged that the child is of wandering or dissolute parents, and living with its poor and dependent grandparents, who had acquiesced in the investigation and its results, it is unnecessary to the valid adjudication fixing the child as a ward of the State, and taking its custody accordingly, that the parents should have been notified to be present at the investigation, though such course is to be commended when the child is living with its parents or under their control, or are living at the time within the jurisdiction of the court. C. S., 5046, 5047. *Ibid.*

4. *Same—Jurisdiction—Conflict of Courts.*—Where the parent of a child that has been adjudicated a ward of the State, under the statute relating to juvenile courts, afterwards claims the possession of the child, the procedure requires that she make application to the juvenile court that had adjudicated the matter in order to avoid conflict and

JUVENILE COURTS—*Continued.*

uncertainty as to the status or condition of the child, to the end that an investigation be made of the circumstances in the course and practice of the courts. *Ibid.*

KNOWLEDGE. See Evidence, 17; Banks and Banking, 12.

LABOR UNIONS. See Injunctions, 5.

LANDLORD AND TENANT. See Contracts, 1; Ejectment, 1, 3; Fires, 2.

LANDS. See Appeal and Error, 9, 12, 17; Deeds and Conveyances, 7; Removal of Causes, 8.

LAPSE. See Wills, 23.

LARCENY. See Evidence, 19.

LAST CLEAR CHANCE. See Railroads, 3.

LAWS. See Appeal and Error, 11; Pleadings, 12; Criminal Law, 8.

LEASES. See Railroads, 7; Ejectment, 1.

LEGACIES. See Wills, 23.

LEGISLATIVE POWERS. See Taxation, 10.

LESSOR AND LESSEE. See Railroads, 7.

LETTERS. See Wills, 3; Executors and Administrators, 1.

LICENSES. See Taxation, 1; Criminal Law, 13, 14, 15; Fires, 2.

LIENS. See Municipal Corporations, 1; Banks and Banking, 11; Contracts, 1, 16; Injunctions, 6, 10; Estates, 2; Bankruptcy, 1; Judgments, 10; Dower, 2, 3.

1. *Liens — Contracts — Principal and Surety — Materialmen — Statutes — Education.*—A contract for the erection of a public-school building, made with the county board of education, does not expressly or impliedly provide for the payment of claims of material furnishers by the obligation of the contractor to furnish the materials therefor at his own expense, without more; and a surety on the bond for the contractor's faithful performance of his contract is not liable to the material furnishers, either under the contract or under the provisions of C. S., 2445, requiring the school authorities to take a bond with surety from the contractor before commencing the building, and giving materialmen, etc., a right of action thereon. *Warner v. Halyburton*, 414.

2. *Same.*—C. S., 2445, before its amendments by chapter 100, Public Laws 1923, requiring, among other things, a county board of education to take a bond with surety for the performance, etc., by the contractor under his contract to erect a public-school building, imposes a new duty on them in this respect, and provides for its enforcement by indictment of the individual members of the board, and no civil liability to the material furnishers, etc., attaches to the board, as such, for a failure to require a sufficient bond for the purpose. *Ibid.*

LIENS—*Continued.*

3. *Liens—Statutes—Subcontractors—Materialmen—Notice to Owner—Actions.*—Where the subcontractor and material furnisher for the erection of a building have given the owner an itemized statement of materials furnished by them therefor, and at that time the owner owes the contractor moneys under the contract made with him, to that extent the subcontractors and materialmen have a lien for the payment of their claims so filed, and may maintain a civil action thereon against the owner under the provisions of C. S., 2439, 2440, 2441, without being required to file their liens within six months, etc., under the provisions of C. S., 2469, or bring suit within six months thereafter under those of C. S., 2474. *Campbell v. Hall*, 464.

4. *Liens—Contracts—Material Furnishers.*—Where the owner has contracted for the erection of a building on his premises, in order for him to acquire a statutory lien thereon, it is required that the contractor file his lien before a justice of the peace or the clerk of the court, according to jurisdiction, within six months from the time moneys are due him, under the terms of his contract, by the owner (C. S., 2470), and bring his action to enforce the same within six months thereafter. C. S., 2474. *Porter v. Case*, 629.

5. *Same—Subcontractor—Notice—Actions—Statutes.*—Where the owner of the building being erected has been given notice of the subcontractor's claim for labor and material furnished to the contractor before the owner settles with the contractor, he must account for and pay to the subcontractor the sum so due, or prorate the same among like claimants, as the case may be. C. S., 2438, 2440, 2442. And the subcontractor may enforce this lien by action commenced within the six months period from the time of the giving of such notice. C. S., 2479 (4). If the action is not brought within six months to enforce the lien, a personal action can be maintained against the owner. *Campbell v. Hale, ante*, 46. *Ibid.*

6. *Same—Priorities.*—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice, take *cum onore*, and subject to the contractor's or subcontractor's lien so acquired. *Ibid.*

7. *Same—Evidence—Nonsuit—Appeal and Error.*—The right of the contractor's lien depends upon the existence of a contract, express or implied; and where, in the contractor's action to enforce his lien, there is sufficient evidence thereof, an issue for the determination of the jury is raised, and the granting of the motion as of involuntary nonsuit against him is reversible error. *Ibid.*

LIFE ESTATES. See Wills, 7.

LIMITATION OF ACTIONS. See Deeds and Conveyances, 1; Railroads, 6; Tenancy in Common, 2; Wills, 10; Abandonment, 1.

1. *Limitations of Actions—Nonsuit—Costs—Conditions—Statutes.*—While, ordinarily, the plaintiffs' cause of action upon simple contract will be

LIMITATION OF ACTIONS—*Continued.*

barred by the statute of limitations from three years after its accrual, and if nonsuit within that period, from one year thereafter, conditioned upon the payment of the cost in the original action, it may be shown by plaintiff that his failure to pay these costs before commencing his second action upon the same contract was caused by the failure or the delay of the clerk of the Superior Court to let him know the amount thereof, though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. C. S., 415. *Hunsucker v. Corbitt*, 496.

2. *Limitation of Actions—Statutes—Payment.*—C. S., 416, providing that a promise to repel the running of the statute of limitations, unless contained in some writing signed by the party to be charged thereby, etc., expressly excepts from its provisions the effect of any payment of principal or interest, thereby leaving as to such payments the principles obtaining at common law before the enactment of the statute. *Kilpatrick v. Kilpatrick*, 520.

3. *Same — Instructions — Appeal and Error.*—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given is reversible error to the plaintiff's prejudice. *Ibid.*

LIMITATIONS. See Principal and Agent, 2.

LIQUIDATED DAMAGES. See Injunctions, 13.

LOST INSTRUMENTS. See Easements, 1, 2.

LUMBER. See Corporation Commission, 1; Municipal Corporations, 4.

MALICE. See Criminal Law, 9.

MANDAMUS. See Courts, 2.

MANSLAUGHTER. See Criminal Law, 9.

MARRIAGE. See Husband and Wife, 1.

MARRIED WOMEN. See Deeds and Conveyances, 8, 14; Wills, 24.

MASTER AND SERVANT. See Employer and Employee, 1, 4; Evidence, 40, 43.

MATERIAL MEN. See Liens, 1, 3, 4; Contracts, 16.

MEMORANDA. See Bills and Notes, 3.

MERITORIOUS DEFENSE. See Judgments, 9.

MILK. See Health, 1.

MISDEMEANOR. See Criminal Law, 15.

MISJOINDER. See Actions, 5.

MISTAKE. See Evidence, 8.

MISTRIAL. See Evidence, 38.

MODIFICATION. See Habeas Corpus, 2.

MONEY. See Municipal Corporations, 3; Dower, 7.

MONEY RECEIVED. See Gaming, 1.

MORTGAGES. See Fraud, 2, 3; Insurance, 1; Municipal Corporations, 2; Banks and Banking, 11; Evidence, 21; Injunctions, 10; Equity, 2, 3; Bankruptcy, 1; Deeds and Conveyances, 8; Judgments, 10; Sales, 1; Dower, 2, 7.

1. *Mortgages—Sales—Default.*—Where the provisions of a mortgage so states, the mortgagee may make a valid sale of the lands described upon default in payment of either the principal of or interest on the note it secures, at the maturity of either. *Miller v. Marriner*, 449.

2. *Same—Estates—Husband and Wife—Tenancy by the Curtesy.*—A surviving husband who has had issue born alive has a life estate in the lands of the wife as tenant by the curtesy, and where the same is subject to a mortgage she has made thereon, he is only required to pay the interest on this indebtedness from the income or rents thereof, and he is not trustee for the children who take in remainder, to the extent of requiring him otherwise to pay the interest as it accrues. *Ibid.*

3. *Same—Purchasers—Fraud—Evidence.*—The husband, as tenant by the curtesy in the lands of his deceased wife, subject to her mortgage, is not, as trustee for the children taking in remainder, required to pay the principal sum due under the terms of the mortgage, and where the land has been sold under the power in the mortgage, and he has acquired the same from the purchaser at the sale, acting as his agent, it is not alone evidence of such a procurement of the property as will invalidate his purchase for fraud. *Ibid.*

4. *Mortgages—Power of Sale—Deeds and Conveyances—Fraud—Equity—Injunction—Tender—Payment.*—The unsecured creditors of the mortgagor, who seek to set aside his deed for fraud, must first make tender to the mortgagee or pay off the mortgage, when by its terms the power of sale therein may be exercised, before they are entitled to the equitable relief of enjoining the sale upon the ground stated, for otherwise they can obtain no equitable right against the mortgagee for the relief sought, without which the courts cannot interfere under the rules of equity applying in such instances. *Leak v. Armfield*, 625.

5. *Mortgages — Deeds of Trust — Statutes — Cancellation — Register of Deeds.*—A statute will be construed to effectuate the legislative intent as gathered from its language, and to harmonize its various parts when this can reasonably be done; and *held*, that C. S., 2594, authorizing the register of deeds to cancel mortgages or other instruments by entry upon the margin of the registration book the word "satisfaction" upon exhibition to him of any mortgage, deed of trust or other instrument, accompanied by the bond or note, with the endorse-

MORTGAGES—*Continued.*

ment of payment and satisfaction by the payee, etc., does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. *Guano Co. v. Walston*, 667.

6. *Same — Fraud — Innocent Parties.*—Where the register of deeds has entered "satisfaction" of a deed of trust to secure borrowed money upon the margin of his registration book, upon the exhibition of the proper endorsement on the note and deed of trust by the payee, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the canceled instrument will not affect their rights when they were unaware thereof or had not participated in the fraud. C. S., 2594 (4). *Ibid.*

MORTGAGOR AND MORTGAGEE. See Injunctions, 6.

MOTIONS. See Appeal and Error, 6, 11, 18; Evidence, 20, 22, 27, 28, 29, 30, 38; Judgments, 2, 3, 8, 9; Statute of Frauds, 1; Pleadings, 12; Habeas Corpus, 1.

MOTIVE. See Contracts, 2; Fires, 2; Evidence, 35.

MUNICIPAL CORPORATIONS. See Health, 1; Appeal and Error, 9; State Highways, 2; Statutes, 4; Negligence, 6; Waters, 1.

1. *Municipal Corporations — Cities and Towns—Street Improvements—Assessments—Statutes—Liens.*—The amount of an assessment on the owner of land lying along a street for street improvements is by statute (chapter 56, section 9, Public Laws 1915), creating a lien superior to all other liens and encumbrances and continuing, until paid, against the title of successive owners thereof. *Bank v. Watson*, 107.

2. *Same — Mortgages — Foreclosures—Title—Contracts.*—In order for a purchaser at a foreclosure sale of land to acquire the title to the mortgagor's equity of redemption, free from liens on the land, it is not alone sufficient that in making his successful bid and in paying the purchase price he intended to so acquire it, but it is necessary that the minds of the parties come to an agreement thereon, as in case of a binding contract. *Ibid.*

3. *Same—Purchase Money.*—Where land is sold by foreclosure proceedings under a mortgage, subject to a valid lien in favor of a city, for street improvements, the lien continues upon the land and does not attach to the purchase money paid. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Police Regulations—Ordinances—Lumber Yards—Courts.*—Under the provisions of C. S., 2787, and under the provisions of its charter authorizing a city to pass needful ordinances for its government not inconsistent with law to secure the health, quiet and safety within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere. *Turner v. New Bern*, 541.

5. *Same—Equity—Injunction.*—Under the facts of this case *it is held* that the defendant's remedy in equity by injunction will not lie, there being an adequate remedy at law. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

6. *Municipal Corporations — Cities and Towns—Streets—Incorporation—Highways—Statutes.*—Upon the incorporation of a town, the public highways theretofore therein existing come within the municipal control as a governmental subdivision, enlarged to meet the broader usages thereof, as streets, and the authority of other governmental agencies is excluded; and the act of 1903, including all incorporated towns in Gaston County under the provisions of the act of 1895 for the better working of the public roads and highways of the county, is in conformity with this principle. *Gastonia v. Cloninger*, 765.

7. *Same—Abutting Owners on Streets Improved—Assessments—Taxation—Peculiar Benefits—Government.*—Statutes prescribing the methods of improving the streets of an incorporated city or town, regulating assessments against abutting property on the streets improved and particularly benefited, comes within the right of taxation vested in the Legislature, exercised thereunder by counties, cities and towns as governmental agencies of the State. *Ibid.*

8. *Same—Constitutional Law—Uniformity of Taxation.*—It is required by the Constitution, Art. V, sec. 33, that property shall be taxed by a uniform rule; and by Article VII, section 9, that all taxes levied by any county, city or town, etc., shall be uniform and *ad valorem* upon all property in the same, except property exempt by the Constitution; and while assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. *Ibid.*

9. *Same — Contribution by County to Streets Improved — Deductions.*—Where a county has, upon previous agreement with a city or incorporated town, paid a proportionate part of the cost of paving a certain street within the city, and the city has paid the balance, each, respectively, out of its general funds, the owners of land abutting on this street cannot maintain the position that from the assessment of their land abutting on the street improved there should proportionately be deducted the amount paid by the county, the same being contrary to the constitutional requirement for the uniformity of taxation in the same class or subject-matter. Constitution, Art. V, sec. 33; Art. VII, sec. 9. *Ibid.*

MURDER. See Criminal Law, 9; Homicide, 4.

NAMES. See Schools, 17.

NECESSARIES. See Taxation, 5.

NEGLIGENCE. See Carriers, 1; Railroads, 1, 11, 13, 16; Admiralty, 1, 2; Judgments, 3, 9; Appeal and Error, 11; Pleadings, 12, 20; Contracts, 17; Employer and Employee, 1; Evidence, 40, 41, 43.

1. *Negligence—Evidence—Questions for Jury—Trials.*—In an employee's action against a railroad company to recover damages for a personal injury alleged to have been negligently inflicted on him in the course of performing his duties, evidence that he was therein injured while running along a way between two parallel tracks on the defendant's yard, by stepping on a piece of stick, unseen by him, while his atten-

NEGLIGENCE—*Continued.*

tion was concentrated upon performing this service, and that it was the duty of the defendant to have kept this pass clean and safe for him, is sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *Barbee v. Davis*, 78.

2. *Negligence—Wrongful Death—Survival of Action—Executors and Administrators—Statutes.*—Where the person who is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor or administrator of the deceased defendant, under the provisions of C. S., 160. *Tonkins v. Cooper*, 570.

3. *Negligence—Railroads—Grade Crossings—Signals—Evidence.*—It is incumbent upon a railroad company, under the common law, unaided by statute, to give proper warnings of the approach of its trains by the timely sounding of the locomotive whistle and the continuous ringing of its bell at a public highway crossing at grade, commensurate with the dangerous condition existing there; and the question discussed by *Clark, C. J.*, as to whether the absence of an electric gong, automatically rung by the passing locomotive in advance of its approach, may also be received upon the issue of actionable negligence, in accordance with the finding of the jury as to whether the danger to life and limb would require it under the existence of the dangerous conditions as found by them under the evidence in this case. *Blum v. R. R.*, 640.

4. *Same—Contributory Negligence—Evidence.*—Where the driver of an automobile was killed by the negligence of a railroad company at a grade crossing with a public highway, under conditions that would have rendered it impossible for him to have seen or apprehended the approach of the defendant's train before entering upon the track at the time of the collision, his failure to have stopped before attempting to cross the track will not bar the recovery of damages for his wrongful death, or affect the negative finding of the jury upon the issue of contributory negligence. *Ibid.*

5. *Negligence — Employer and Employee—Damages—Proximate Cause—Intervening Cause—Indictment.*—In an action to recover damages by an employee of a corporation on the ground that defendant's vice-principal sent him with a message to another and dangerous employee, unknown to plaintiff at the time, which resulted in the plaintiff knocking him down in self-defense and killing him, and being tried for manslaughter and acquitted: *Held*, the plaintiff's humiliation and expense in being indicted are too remote for a recovery of damages, and the State alone being an independent and intervening cause of the indictment, the proximate cause of the damages alleged was not that of the defendant, and a judgment as of nonsuit on the evidence, on defendant's motion under the statute, was properly allowed. *Van Dyke v. Chadwick-Hoskins Co.*, 695.

6. *Negligence—Intervening Cause—Proximate Cause—Railroads—Municipal Corporations—Cities and Towns—Ordinances.*—While it may be negligence *per se* for the speed of a railroad train to exceed in a city or incorporated town the speed required by an ordinance, the company is not liable in damages for the killing of a 9-year-old child at

NEGLIGENCE—*Continued.*

play at a permitted crossing, whose death is caused by his being unexpectedly pushed into the train by his companion and playmate as it was passing, the act of the child's companion being the independent, intervening and sole and proximate cause of the death. *Lineberry v. R. R.*, 786.

7. *Same—Evidence—Questions of Law.*—Where, upon the trial of an action, only one inference can reasonably be drawn from the evidence, no issue of fact arises for the jury to determine, and the question is one of law for the court. *Ibid.*

8. *Negligence—Electricity.*—There is nothing by which the user of an electrical appliance can detect the presence of an unusual high voltage or deadliness of current before touching the wire or coming in contact with it, and the greatest degree of care is required of those furnishing this deadly instrumentality to guard against the danger of its ordinary use as the circumstances may require. C. S., 2763, 2764, 2766. *McAllister v. Pryor*, 832.

9. *Same—Evidence—Res Ipsa Loquitur—Nonsuit—Questions for Jury.*—Where the furnisher of electricity for a building was, under its contract with the owner, required to furnish a low voltage of electricity for lighting and various domestic uses, and there is evidence tending to show that in attempting to iron clothes within the building with an electric iron the plaintiff touched the ironer and received a severe shock of electricity, to her injury, which should not and would not ordinarily have occurred by such use had the defendant supplied the current it had contracted to do, the doctrine of *res ipsa loquitur* applies, and the issue of actionable negligence should be submitted to the jury, denying defendant's motion as of nonsuit thereon. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 6; Banks and Banking, 8.

NEW TRIALS. See Carriers, 1; Judgments, 7.

1. *New Trials.—Partial New Trials—Issues—Appeal and Error.*—Where damages are sought in an action against a carrier for a personal injury involving the issues of negligence and assumption of risks, and the Supreme Court, on appeal, has granted a new trial only on the issues of damages, these issues are properly refused by the judge upon the retrial of the case, the remedy being by a petition to rehear in the Supreme Court under its Rules of Practice. *Strunks v. R. R.*, 175.

2. *Same—Damages—Evidence—Carriers—Railroads—Federal Employers' Liability Act.*—Under the Federal Employers' Liability Act, contributory negligence is considered in diminution of the employee's damages for personal injury alleged to have been caused by the defendant's negligence; and upon a new trial awarded by the Supreme Court upon the issues of damages alone, it is reversible error for the trial judge to exclude evidence of this character under the defendant's objection, when confined to this phase of the controversy, the amount of the damages being for the jury to determine upon conflicting evidence. *Ibid.*

NONRESIDENCE. See Summons, 1.

NONSUIT. See Banks and Banking, 6; Homicide, 5; Evidence, 2, 3, 20, 28, 37; Railroads, 2, 16; Carriers, 4, 8; Appeal and Error, 9, 17; Statute of Frauds, 1; Limitation of Actions, 1; Liens, 7; Bills and Notes, 6; Corporations, 5; Employer and Employee, 2; Negligence, 9.

NOTES. See Banks and Banking, 15.

NOTICE. See Equity, 4; Liens, 3, 5; Juvenile Courts, 3; Deeds and Conveyances, 7.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 1, 5, 7, 14, 15, 20; Criminal Law, 4; Evidence, 22, 27, 38; Homicide, 3; Railroads, 5; Jury, 2; Courts, 3; Employer and Employee, 4.

OFFICERS. See Banks and Banking, 2, 12; Evidence, 16.

OPINION EVIDENCE. See Evidence, 13, 14, 19.

OPINIONS. See Criminal Law, 6; Instructions, 3.

ORDERS. See Removal of Causes, 5.

ORDINANCES. See Municipal Corporations, 4; Health, 1; Negligence, 6.

ORGANIZATION. See Schools, 5.

OUSTER. See Tenancy in Common, 2.

OWNERSHIP. See Liens, 3; Waters, 1.

PARENT AND CHILD. See Juvenile Courts, 3; Actions, 2; Habeas Corpus, 1.

PAROL AGREEMENT. See Bills and Notes, 1.

PAROL EVIDENCE. See Evidence, 11; Contracts, 12, 20.

PAROL TRUSTS. See Trusts, 1.

PARTIES. See Removal of Causes, 1; Injunctions, 6; Taxation, 9; Ejectment, 1; Mortgages, 6; Actions, 4; Courts, 3.

PARTITION. See Estates, 5.

PARTNERSHIP.

1. *Partnership—Evidence—Deceased Persons—Statutes.*—Where the liability of the defendant depends upon whether he was a partner in a firm at the time a debt was contracted by defendant firm, the fact at issue may be proved by the plaintiff either by direct or circumstantial evidence. *Herring v. Ipock*, 459.

2. *Same — Interest — Transactions and Communications.*—Where defendant's liability depends upon whether he was a member of defendant partnership at the time the firm contracted a debt with the plaintiff, the subject of the action, who has since died and his administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of C. S., 1795, as to the payment to his own knowledge by deceased of the partnership debts. *Ibid.*

PARTNERSHIP—*Continued.*

3. *Same—Questions for Jury—Trials.*—Where the deceased defendant is sought in an action to be held liable as a partner of a firm, for the debts of the firm, a lumber manufacturing concern, and there is evidence tending to show he had frequently paid its debts in the course of its operation, a disinterested witness may testify that the firm would dress his lumber as a partner; and, whereas to a single transaction he has stated that he thought certain of his lumber was thus dressed, it leaves the weight and credibility of his evidence thereon to the jury. *Ibid.*

4. *Same — Opening the Door for Defendant's Evidence.* — Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and C. S., 1795, prohibiting testimony as to transactions, etc., with a deceased person, does not apply. *Ibid.*

5. *Partnership — Debtor and Creditor—Individual Liability—Statutes.*— Under the provisions of our statute, C. S., 3259, the liability of each partner for the firm's debts is made both joint and several, and the English equitable doctrine that requires the firm's creditors to exhaust the partnership assets and then call in aid the property of the individual partner for the unpaid balance of the firm's debts no longer obtains in this jurisdiction. As to whether the individual and private creditors of a deceased partner are entitled to share ratably with the creditors of the partnership in the deceased partner's interest in the firm assets, *quere? Chemical Co. v. Walston*, 817.

PASSENGERS. See Carriers, 9.

PASTEURIZATION. See Health, 1.

PAYMENT. See Actions, 1; Limitation of Actions, 2; Banks and Banking, 16; Mortgages, 4.

PENALTIES. See Contracts, 1; Taxation, 12.

PERFORMANCE. See Vendor and Purchaser, 2.

PERSONAL INJURIES. See Contracts, 17.

PERSONAL PROPERTY. See Equity, 1; Dower, 4.

PERSONAL RELATIONS. See Railroads, 15.

PETITION. See Executors and Administrators, 1; State Highways, 3; Tenancy in Common, 7.

PILOTS. See Admiralty, 1.

PLACE. See Employer and Employee, 4.

PLEADINGS. See Bills and Notes, 4; Judgments, 7, 8, 9, 12; Easements, 1; Railroads, 4; Appeal and Error, 6, 12; Contracts, 11, 22; Injunctions, 9; Tenancy in Common, 5; Removal of Causes, 4, 9.

1. *Pleadings — Amendments — Discretion of Court — Commerce—Federal Employers' Liability Act—Railroads.*—In an action against a railroad company for damages for a personal injury brought within the time limited by the State statute, and which has been pending for several years, it is within the sound discretion of the trial judge not to permit the defendant to amend its answer, just before the trial of the cause, and set up as a defense, under the Federal Employers' Liability Act, that the plaintiff, its employee, was, at the time of the injury complained of, engaged in interstate commerce, and his cause of action had been barred in two years under the provisions of the Federal statute. *Barbee v. Davis*, 78.

2. *Same—Waiver.*—Where a railroad company has been sued in the State court for damages for an alleged personal injury, and from the allegations of the complaint it appears that the cause of action was based upon the principles of intrastate commerce, by its answer the defendant waives its right thereafter to set up as a defense that the plaintiff, its employee, at the time of the injury, was engaged in interstate commerce, and contend that the Federal Employers' Liability Act controlled upon the trial. *Ibid.*

3. *Same—Answer—Presumptions—Statutes.*—Where an employee's action against a carrier to recover damages for its negligence in inflicting on him a personal injury, upon allegations of the complaint that it arose in intrastate commerce, these allegations will be taken as true when not denied in the answer. C. S., 545. *Ibid.*

4. *Pleadings—Equity—Specific Performance.*—A suit for specific performance of a contract to convey lands will not be dismissed for insufficiency of allegations to maintain an action for the relief sought when it contains a prayer to that effect, and, construing the complaint liberally, the allegations appear to be sufficient. *Green v. Harshaw*, 213.

5. *Same—Actions at Law—Constitutional Law.*—Where the complaint is construed to be sufficient to sustain the suit for specific performance, objection for indefiniteness or that the action sounded in damages in a court of law, must be made in apt time; and where a good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by Constitution of North Carolina, Art. IV, sec. 1. *Ibid.*

6. *Pleadings—Evasive Answers—Injunction—Equity—Contracts—Coöperative Marketing.*—In proceedings for injunctive relief by a coöperative marketing association, wherein the plaintiff definitely alleges that the defendant had breached his contract, and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of the injunctive relief. *Tobacco Assn. v. Patterson*, 252.

PLEADINGS—*Continued.*

7. *Pleadings—Verification—Signature of Pleader.*—It is not vitally necessary that a party sign the verification to his pleadings, though the practice that he do so is commended. C. S., 529. *Cahoon v. Everton*, 369.

8. *Pleadings — Clerks of Court — Jurisdiction — Judgments—Default of Answer—Statutes.*—Where the plaintiff is entitled to a judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil-issue docket for trial. Chapter 92, Public Laws 1921, Extra Session. *Ibid.*

9. *Same—Amendments—Superior Courts—Trial Judge.*—Where the plaintiff has waived his right to a judgment by default before the clerk, and the cause has been transferred to the civil-issue docket for trial, the trial judge has the authority, under the provisions of C. S., 536, to allow the defendant to amend his answer. *Ibid.*

10. *Same—Issues Joined.*—The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil-issue docket when the issue has been joined within ten days from the commencement of the term. C. S., 557, amended by chapter 124, Public Laws 1923. *Ibid.*

11. *Pleadings—Actions—Debt—Sufficiency of Answer—Issues—Statutes.*—Where the complaint alleges an action of debt, an answer denying the debt *is held* sufficient, under section 535, C. S. *Chesson v. Lynch*, 186 N. C., 625, applied to the facts of this case. *Ibid.*

12. *Pleadings—Statutes—Judgment— Default of Answer—Excusable Neglect—Ignorance of the Law—Motions.*—Where a party is made a defendant by service of summons, together with the complaint filed in the action, he is irrebuttably fixed with notice that, under the provisions of C. S., 600, he is required to file his answer in twenty days from substitute service; and on his motion to set aside judgment rendered in default of an answer, his ignorance of the law will not excuse him, though misled by the erroneous wording of the summons in this respect. *Lerch v. McKinne*, 419.

13. *Pleadings—Statutes—Clerks of Court—Jurisdiction—Time Extended.*—Where the summons is served with the copy of the complaint, under the provisions of chapter 92, Public Laws of 1921, the clerk of the Superior Court is not given the power to extend the time of the filing of an answer beyond twenty days after the service has been made. *Battle v. Mercer*, 438.

14. *Same—Superior Court—Judge.*—Under the provisions of chapter 92, section 1 (18), Public Laws of 1921, the power of the Superior Court judge to allow amendments to pleadings given by C. S., 547, or to allow answer to be filed, C. S., 536, applying also to the defendant in possession of lands and claiming an interest therein giving bond, C. S., 495, is not affected. *Ibid.*

15. *Pleadings—Judgment by Default—Intervener—Issues—Title—Right of Possession.*—A landlord, intervening in an action of the mortgagee of a crop raised by the tenant on the intervener's land and covered by the plaintiff's mortgage, is permitted only to raise the issue as

PLEADINGS—*Continued.*

to his superior lien over that of the mortgagee, and not required to be otherwise plead in the action; and when the intervener's motion is sufficient in this respect, C. S., 840, it is reversible error for the trial judge to render a judgment by default for the want of intervener's answer, the procedure, if desired, being to require the intervener to make his motion more specific, or file an answer to that effect. *Hill v. Patillo*, 531.

16. *Pleadings—Statutes—Presumptions.*—Under the provisions of chapter 92, section 1, subsections 2 and 3, Public Laws, Extra Session of 1921, it will be presumed on appeal that the complaint in a civil action was filed on or before the return day of the summons, nothing else appearing, according to the time thereof therein specified. *Jones v. Jones*, 589.

17. *Same—Defendant's Bond to Retain Possession of Lands.*—When the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the land, the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, C. S., 495, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. Chapter 93, section 1, subsections 2, 3, Public Laws, Extra Session 1921. *Ibid.*

18. *Same—Receivers—Remedy at Law.*—In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continued possession, C. S., 495, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, C. S., 860, sec. 1, is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. *Ibid.*

19. *Same—Appeal and Error.—Held*, upon the record in this appeal, involving only the plaintiff's right to the appointment of a receiver for the defendant, the question of the sufficiency of the allegations of the complaint to state facts sufficient to constitute a cause of action to set aside defendant's deed to the lands in controversy does not arise. *Ibid.*

20. *Pleadings — Evidence—Principal and Agent—Negligence—Vice-Principal.*—In an action to recover for the wrongful death of plaintiff's intestate, involving the question of the negligence of the defendant's vice-principal, it is not required that the complaint allege that the vice-principal was absent at the time of the injury, for the plaintiff to introduce evidence of this fact, and that another was acting in this capacity in his absence. *Dellinger v. Building Co.*, 845.

POLICE POWERS. See Municipal Corporations, 4.

POLICIES. See Insurance, 1.

POLLS. See Criminal Law, 17; Jury, 1.

POSSESSION. See Tenancy in Common, 2, 5; Contracts, 1; Intoxicating Liquor, 1; Appeal and Error, 12; Pleadings, 15, 17; Bills and Notes, 6.

POWERS. See Wills, 7, 16, 19, 20, 24, 25; Deeds and Conveyances, 9; Mortgages, 4.

PREJUDICE. See Criminal Law, 6.

PREMATURE APPEALS. See Appeal and Error, 6.

PRESCRIPTION. See Easements, 1.

PRESUMPTIONS. See Appeal and Error, 2, 3, 5, 15; Easements, 2; Pleadings, 3, 16; Wills, 5, 17, 27; Carriers, 5; Railroads, 12; Guardian and Ward, 5; Criminal Law, 9, 22; Removal of Causes, 5; Bills and Notes, 6.

PRIMA FACIE CASE. See Appeal and Error, 2; Carriers, 1; Railroads, 12; Guardian and Ward, 5.

PRINCIPAL AND AGENT. See Taxation, 1; Banks and Banking, 8, 12; Evidence, 9, 11; Contracts, 21; Pleadings, 20.

1. *Principal and Agent—Agent's Declarations—Evidence Aliunde.*—Where, as a result from an injury from a newspaper advertisement, the plaintiffs have received a letter from the defendants, stating they would send their certain-named agents to negotiate with them for the sale of automobiles in a local territory, and soon thereafter two men approached the defendant, representing themselves by the same names as the ones spoken of in the defendants' letter, it is sufficient evidence *aliunde* to admit declarations of agency by those representing themselves as such. *Hunsucker v. Corbitt*, 496.

2. *Principal and Agent—Vendor and Purchaser—Warranty of Agent—Secret Limitations.*—Sales agents have implied authority to bind their principals by their warranties of grade and quality of the merchandise they are employed to sell, and secret or unusual limitations of this authority not disclosed to the purchasers is not binding on them. *Ibid.*

3. *Principal and Agent — Broker — Insurance—Ratification.*—Where the broker, unauthorized by the owner, has paid an extra war rate of insurance for water foreign transportation of a shipment of tobacco, any act or conduct of the owner after the safe transportation of the shipment will not be construed as a ratification of the agent's unauthorized act, so as to allow the broker a right of action to recover of the owner the extra rate the former has so paid. *Starkweather v. Gravely*, 526.

4. *Principal and Agent — Evidence—Declarations of Agent—Accident—Hospital Expenses.*—Evidence that one in charge of a construction company's camp, with authority to employ and discharge workmen, to supply them with provisions, etc., at the company's expense, and generally to look after their welfare, is sufficient *aliunde* to admit in evidence his declarations of agency and to bind his principal upon an emergency to pay for his surgical and other expenses, at a hospital, of one of the employees who had met with a serious or fatal accident, in the course of his employment, irrespective of the negligence of his employer, upon his representation to the hospital authorities that his principal would pay them. *Miller v. Cornell*, 550.

PRINCIPAL AND AGENT—*Continued.*

5. *Principal and Agent — Deeds and Conveyances — Contracts.*—Where there is evidence that one representing himself to be the agent of the owner of land called on the proposed purchaser in pursuance of a telephone conversation he had had with the principal, and entered into a written contract to convey the lands in behalf of his principal, upon certain conditions, it is, with the other evidence in this case, *held* sufficient to be submitted to the jury upon the question of agency and to bind the owner under the provisions of the statute of frauds. *McCall v. Institute*, 757.

6. *Same—Signature—Evidence Aliunde—Questions for Jury—Statute of Frauds.*—Where there is evidence that the one acting as the agent of the owner of lands signed his own name to the written contract of sale, in a space left for the witnesses, it is competent to show *aliunde* as an issue for the jury that he had signed in behalf of his principal, and that the latter was thereby bound under the statute of frauds; and *semble*, it could also be so shown as to an undisclosed principal. *Ibid.*

PRINCIPAL AND SURETY. See Liens, 1; Contracts, 16; Judgments, 8, 10.

1. *Principal and Surety—Contracts—Fraud—Deceit—Suits—Cancellation—Equity.*—Where a surety on a bond given by it and its principal for the faithful performance of a contract with another, brings suit to set aside the instrument for fraud or deceit, it is not sufficient to show the fraud, but he must also establish the fact that the obligee as well as the principal intended to deceive, and that the fraud induced the plaintiff to execute the bond as surety. *Indemnity Co. v. Tanning Co.*, 190.

2. *Same—Evidence—Questions for Jury.*—Where the surety for the faithful performance of a contract seeks to set the bond aside for fraud and deceit practiced upon it on the ground that the representations were made upon the basis that the contract called for a consideration to be paid by the obligee to its principal, and in fact it was for a pre-existing debt, and it was shown that the obligee was unaware of and had not participated in the fraud or deceit alleged; and the evidence is conflicting as to whether the fraud or deceit complained of had induced the plaintiff to execute the bond as surety, or whether it was induced by the true representations made by the principal of its solvency, and valuable collaterals, etc., received by the plaintiff at the time, the evidence presents an issue of fact for the determination of the jury. *Ibid.*

PRIORITIES. See Bankruptcy, 1; Liens, 6.

PROBATE. See Deeds and Conveyances, 6, 8.

PROCEEDS. See Tenancy in Common, 4.

PROCESS. See Constitutional Law, 5, 13; Guardian and Ward, 2; Wills, 8; Summons, 1; Executors and Administrators, 1; Appeal and Error, 19; Habeas Corpus, 1.

PROFERT. See Easements, 1.

PROMISE. See Statute of Frauds, 1.

PROPERTY. See Taxation, 4; Corporations, 5.

PRO TANTO. See Equity, 5; Banks and Banking, 15.

PROXIMATE CAUSE, 1, 13; Negligence, 5, 6; Employer and Employee, 1.

PUBLICATION. See Summons, 1.

PUBLIC POLICY. See Corporations, 3.

PUBLIC USE. See Constitutional Law, 4.

PUNISHMENT. See Criminal Law, 12.

PURCHASERS. See Mortgages, 3; Banks and Banking, 16.

QUALIFICATIONS. See Jury, 4.

QUANTUM OF PROOF. See Trusts, 1; Evidence, 32.

QUESTIONS AND ANSWERS. See Appeal and Error, 1.

QUESTIONS FOR JURY. See Banks and Banking, 6, 9; Principal and Surety, 2; Contracts, 5, 22; Evidence, 1, 12, 37; Injunctions, 2, 10; Negligence, 1, 9; Tenancy in Common, 3; Admiralty, 2; Vendor and Purchaser, 1; Railroads, 1, 16; Guardian and Ward, 5; Statute of Frauds, 1; Partnership, 3; Criminal Law, 8, 16; Homicide, 5; Principal and Agent, 6; Employer and Employee, 2.

QUESTIONS OF LAW. See Negligence, 7.

QUO WARRANTO. See Contracts, 4.

RAILROADS. See Carriers, 1, 4, 6, 7; Pleadings, 1; New Trials, 2; Corporation Commission, 1; Contracts, 14; Negligence, 3, 6.

1. *Railroads — Negligence—Contributory Negligence—Proximate Cause—Trespass.*—Where a person was walking, in broad daylight, and for his own convenience, along a live railroad track, alert and in full possession of his faculties, and not at a public road crossing or other place where pedestrians are expected to walk, and was killed by the passing of the defendant's train, his contributory negligence is the continuing and the proximate cause of the injury in the plaintiff's action for damages, and will bar his right of recovery. *Davis v. R. R.*, 147.

2. *Same—Evidence—Nonsuit.*—Where the plaintiff's uncontradicted evidence tends only to show that his intestate was negligently walking along the defendant's railroad track, and was killed in consequence of his own contributory negligence as the proximate cause of his death, a judgment as of nonsuit is properly entered, though the motorman on defendant's passing train may not have observed a town ordinance requiring a warning to be given at a public crossing, some distance from the place at which the intestate was killed. *Ibid.*

3. *Same—Last Clear Chance.*—Where the plaintiff's intestate was killed by being struck by a passing train of the defendant while he was walking along the side of the defendant railroad company's track, and the evidence tends only to show that the proximate cause of his death was his negligently failing to take the precautions necessary for his own safety, under the circumstances, the evidence tending to show defendant's failure to give a warning required at a crossing some distance from the place where the intestate was killed does not involve the issue of the last clear chance. *Ibid.*

RAILROADS—*Continued.*

4. *Railroads — Pleadings — Counterclaims—Torts.*—A counterclaim is not permissible for a distinct and independent tort, and where a railroad sues to recover a part of its right of way from one who is alleged to have wrongfully appropriated it, a counterclaim for a trespass by the plaintiff on a different tract of defendant's land is not maintainable. *R. R. v. Nichols*, 153.

5. *Same—Courts—Jurisdiction—Appeal and Error—Objections and Exceptions—Demurrer.*—The matter of setting up in the answer an improper counterclaim is not jurisdictional, and the plaintiff may waive his right to except thereto by proceeding throughout the trial without objection; and a demurrer entered upon the ground that the evidence to sustain the counterclaim was insufficient does not meet the requirement. *Ibid.*

6. *Railroads—Trespass—Permanent Structures—Damages—Limitation of Actions—Actions.*—The present owner of land may recover of a railroad company, under the provisions of C. S., 440 (2), the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. *Ibid.*

7. *Railroads — Carriers—Leases—Lessor and Lessee—Torts—Damages.*—The North Carolina Railroad, as lessor of its railroad and equipment to the Southern Railway Company, is liable during the continuance of the lease for the torts and wrongs of the latter company, its agents and employees, committed in the use and operation of the railroad within the exercise of its franchise. *R. R. v. Story*, 184.

8. *Same — Government — Courts — Jurisdiction — State Courts —Federal Questions—Judgments—Execution—Appeal and Error.*—Where judgment has been entered against the lessor of a carrier under government control in the State courts and affirmed by the State Supreme Court on appeal, and in another action brought thereon the judgment is upheld on a second appeal, and in both the carrier has set up all its defenses under the Federal Transportation Act of 1920, inclusive of denying to the plaintiff therein the right to issue execution against the property of the carrier, the judgment in the State court, not properly questioned by an appeal or writ of error upon the Federal defenses thus presented, is conclusive upon the lessor carrier, and valid; and the carrier's suit in the State court to enjoin its enforcement by execution against the lessor's property cannot be maintained. *Ibid.*

9. *Same.*—Where the defendant in an action sets up Federal questions as a valid defense to his liability in the State court, the decisions of the United States Supreme Court are controlling on the subject; but where this right has been erroneously denied by final judgment in the State court, it is conclusive on the carrier until it is reversed or modified by appeal or other writ in the orderly review of the case. *Ibid.*

10. *Same.*—Under the facts of this case: *Held*, the position of the carrier seeking injunctive relief against execution under the final judgments

RAILROADS—*Continued.*

rendered against it in the State court, that the judgments were upon such grounds as to exclude its taking the case by proper proceedings to the United States Supreme Court upon the Federal questions involved, is untenable. *Ibid.*

11. *Railroads—Carriers—Street Railways—Employer and Employee—Negligence — Res Ipsa Loquitur — Collisions — Evidence—Questions for Jury—Statutes.*—In an action by the administrator of a deceased employee of an electric railway company to recover for his intestate's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's actionable and continuing negligence proximately caused the employee's death, and, under the doctrine of *res ipsa loquitur*, raises the issue for the determination of the jury as to whether the defendant's negligence proximately caused the death, though the intestate's contributory negligence may also have been one of the proximate causes thereof. C. S., 160, 3465, 3466, 3467, 3468. *Hinnant v. Power Co.*, 288.

12. *Same — Presumptions — Prima Facie Case—Burden of Proof.*—In an action by the administrator to recover damages for the negligent death of his intestate, an employee of the defendant railroad company, the fact that it was caused in broad daylight by a collision with another of defendant's trains having the right of way, raises a *prima facie* case of defendant's actionable negligence sufficient to sustain a verdict in plaintiff's favor, the burden of proof remaining with the plaintiff, though subject to the defendant's evidence in rebuttal; and an instruction to this effect is sustained on the evidence in this case. *Ibid.*

13. *Same—Continuing Negligence—Proximate Cause—Rules.*—In an action against a street railway company to recover for the negligent death of the plaintiff's intestate wherein it was admitted that the death resulted from a head-on collision in broad daylight with another of defendant's trains on its trestle, and there is evidence tending to show there was continuing negligence on the defendant's part in having its motorman on the other car to continue to run on its right-of-way schedule under the circumstances, and also on the part of the intestate motorman in violating the defendant's rule by talking to another employee on the platform with him, the question of proximate cause cannot be determined as a matter of law in defendant's favor on its motion as of nonsuit, but leaves the issues as to negligence and contributory negligence for the jury to determine, under proper instructions as to proximate cause, under the rule of the prudent man. *Ibid.*

14. *Same—Contributory Negligence—Comparative Negligence—Damages—Statutes.*—In an action against a railroad company to recover for the negligent death of plaintiff's intestate, an employee engaged at the time in the course of his employment as such employee, contributory negligence under the provisions of our statute is not a complete bar to the plaintiff's right of recovery, but is considered by the jury only in diminution of his damages. C. S., 3467. *Ibid.*

15. *Railroads — Consideration — Contracts — Employment—Personal Relations.*—Where a valid contract for the employment of personal serv-

RAILROADS—*Continued.*

ices for life has been made by a railroad company in consideration of forbearance by the employee to sue the company to recover damages for a personal injury, it is binding upon a subsequent combination of this and other railroads that continued to accept the employee's services in recognition of the contract, and the principle upon which a contract of this character may not be assigned is inapplicable. *Stevens v. R. R.*, 528.

16. *Railroads — War—Negligence—Questions for Jury—Nonsuit—Director General of Railroads.*—Where, in an action against the Director General of Railroads and a railroad company under war control, for the negligent loss *in transitu* of several of a carload shipment of mules, the Director General filed answer, admitting the receipt of the mules for transportation, and the loss *in transitu*, but denied negligence, a nonsuit as to the defendant railroad should be entered, leaving the issue as to the defendant Director General for the determination of the jury. *Byrd v. Davis*, 575.

RATES. See Corporation Commission, 1.

RATIFICATION. See Principal and Agent, 3.

RECEIPT. See Guardian and Ward, 1.

RECEIVERS. See Pleadings, 18; Actions, 4.

RECORD. See Appeal and Error, 1, 3, 18; Taxation, 9; Contracts, 18.

REGISTER OF DEEDS. See Mortgages, 5.

REGISTRATION. See Equity, 4.

REHEARING. See Appeal and Error, 4, 16.

RELATIONSHIP. See Courts, 3.

RELIGION. See Deeds and Conveyances, 9.

REMAINDER. See Wills, 7, 11, 16, 21, 25; Estates, 4, 5; Deeds and Conveyances, 10, 12.

REMAND. See Taxation, 9; Appeal and Error, 10.

REMEDY AT LAW. See Injunction, 13; Pleadings, 18.

REMOVAL OF CAUSES.

1. *Removal of Causes—Transfer of Causes—Banks and Banking—Joinder of Parties—Good Faith.*—Where in good faith a citizen and resident of one county sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business, C. S., 469, 470. As to whether the Federal statute, entitled "Locality of Actions," provides that the venue must be in the county wherein the bank was located, should the bank have been sued alone, *quere? Semble*, if so, the bank could waive this right. *Curlee v. Bank*, 119.

2. *Removal of Causes — Transfer of Causes—Statutes—Discretion—Absence of Discretion—Appeal and Error.*—Under the provisions of

REMOVAL OF CAUSES—*Continued.*

C. S., 469, 470 (2), it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, *it is held*, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal. *Ibid.*

3. *Removal of Causes—Waiver—Courts—Jurisdiction.*—The right of defendant to remove a cause from the State to the Federal court under the provisions of the Federal Removal Act, is not jurisdictional, and may be waived by his failure to assert his right as the statute requires and in apt time. *Powell v. Assurance Society*, 596.

4. *Same—Pleadings—Rules of Court—Statutes.*—The Federal Removal Act, requiring that the defendant having this right file his petition and bond for removal before time for answer, etc., has expired, as fixed by the State law, or by the rule of the courts of the State in which such suit has been instituted and is pending, applies only to such rule having a general fixed and uniform relation to all cases coming within its provision, and not to an order allowing an extension of time to plead in the particular case. *Ibid.*

5. *Same—Terms of Court—Orders—Presumptions.*—The provisions of the Consolidated Statutes requiring that pleadings in civil actions be filed in the Superior Court during term, under certain regulations, with the presumption that all the parties were actually or constructively before the Superior Court during term, have been changed by express provision of the recent statute giving the jurisdiction to the clerk of the court, the defendant being given twenty days after the final day fixed for the time to answer, when the complaint has not been served with the summons; and the defendant desiring to remove the cause from the State to the Federal court under the Federal statute, may within that time file his proper petition and bond in the State court wherein the action had been brought, if done before he has filed his answer, or demurred, and his failure to object to an order allowing the plaintiff further time for the filing of the complaint is not now a waiver of his right. Public Laws, Extra Session of 1921, sec. 1, subsecs. 2 and 3. *Ibid.*

6. *Removal of Causes—Diversity of Citizenship—Federal Courts.*—Under the Federal Removal Act, in order for a nonresident defendant, joined with a resident defendant, to have the cause removed to the Federal court for diversity of citizenship, it is required for it to appear from the allegations of the complaint of a resident plaintiff that the defendant movant is a nonresident and that the cause is entirely severable as to him, or that he was fraudulently joined with the resident defendant to oust the Federal court of its jurisdiction, or he must show that he was not a mere nominal party and that the resident defendant had no substantial interest in the subject-matter of the controversy. *Morganton v. Hutton*, 736.

7. *Same—Courts—Jurisdiction.*—The filing before the clerk of the State court of a petition and bond by defendant for removal of a cause from the State to the Federal court for diversity of citizenship is

REMOVAL OF CAUSES—*Continued.*

not alone sufficient to oust the jurisdiction of the State court, and the latter court may proceed to determine as a matter of law the question of the defendants' right to the Federal jurisdiction, and he may then have an adverse final judgment reviewed in the Supreme Court of the United States, under the provisions of the Federal statute. *Ibid.*

8. *Same — Complaint — Eminent Domain—Condemnation of Land.*—The beneficial interest in lands sought to be condemned for a public use held by a resident defendant, with power to direct the nonresident holder of the naked legal title to convey to whom he may direct, is not sufficient to confer upon the resident defendant the right to remove the cause to the Federal court. *Ibid.*

9. *Same — Pleadings—Amendments—Statutes.*—Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the Federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under C. S., 1414, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act. *Ibid.*

10. *Same—Cause of Action.*—Proceedings for the condemnation of lands for a public use are within the sole jurisdiction of the State court, and present no cause of action within the contemplation of the Federal Removal Act until a controversy has arisen thereupon with a nonresident defendant upon the question of his compensation for the lands thus taken, but never where the interest of a resident co-defendant is involved. *Ibid.*

REOPENING CASE. See Habeas Corpus, 1.

REPLEVIN. See Judgments, 8, 10.

REPRESENTATIONS. See Contracts, 7.

REQUESTS. See Criminal Law, 4; Instructions, 7.

RESIDENCE. See Actions, 2.

RESIDUARY CLAUSE. See Wills, 13.

RES IPSA LOQUITUR. See Railroads, 11; Evidence, 43; Negligence, 9.

REVIEW. See Injunctions, 3, 8.

REVIVAL. See Appeal and Error, 10.

REVOCATION. See Wills, 4.

RIGHTS. See Constitutional Law, 1; Pleadings, 15; Easements, 1.

RULE IN SHELLEY'S CASE. See Estates, 3; Deeds and Conveyances, 10.

RULE OF PRUDENT MAN. See Banks and Banking, 15.

RULES. See Railroads, 13.

RULES OF COURT. See Appeal and Error, 14, 16; Removal of Causes, 4.

SALES. See Tenancy in Common, 4; Fraud, 3; Wills, 16, 19, 20, 24, 25; Deeds and Conveyances, 9; Mortgages, 4.

1. *Sales—Mortgages—Statutes—Clerks of Court—Jurisdiction.*—Under the provisions of C. S., 2591, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale of a mortgage when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. *In re Ware*, 693.

2. *Same—Appeal.*—The discretion vested in the Superior Court judge on appeal from the clerk, C. S., 637, to hear and determine the matter in controversy, unless it appear to him that justice would be more cheaply or speedily administered by remanding it to the clerk, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under C. S., 2591, to further pass thereon in the absence of an increased bid. *Ibid.*

SCHOOLS. See Counties, 1.

1. *Schools—Consolidation of Districts—Taxation—Statutes—Special Tax Districts.*—Under the provisions of the statute, the county board of education created a special taxing district, and upon a sufficient petition from the qualified voters therein the county commissioners ordered an election for the purpose of voting a supplementary additional tax for school purposes, which was carried by a majority of the qualified voters at an election held upon the proposition: *Held*, the taxation is valid if, under the provisions of Public Laws 1923, ch. 136, secs. 3 and 234, the board of education has assumed all indebtedness, bonded or otherwise, of the district, and to pay impartially the interest and installments out of the revenue derived from the rate thus established, and the revenue is sufficient to equalize educational advantages and to pay the interest or installments on the bonds outstanding; and an exception that it was an enlargement of a special tax district to unlawfully take in those that were nonspecial tax, without submitting the question of taxation to the latter, is untenable. *Plott v. Comrs.*, 126.

2. *Schools—School Districts—Combination—County Board of Education—County Commissioners—Taxation — Elections—Statutes.*—The county board of education may form new school districts by combining contiguous or adjoining special local with nonspecial existing tax districts (Art. 18, ch. 136, Public Laws 1923), and upon petition of the voters, filed under section 219, article 7, a valid election may be called by the county commissioners under the further provision of said article 18 to vote upon the question of a special tax for the district so formed under the statutory limitations as to the rate imposed and the observance of the condition required by the statute to take care of the indebtedness already incurred by such of the special districts thus in the combination as may have theretofore voted for a special school tax within their former boundaries. The question as to special charter school districts is not presented in this case. *Sparkman v. Comrs.*, 241.

SCHOOLS—*Continued.*

3. *Same.*—Where, by proper statutory procedure, a school-tax district has been formed by a combination of existing special and nonspecial local-tax districts, and accordingly the county commissioners have called an election for the approval of the voters of a special tax, such approval by a majority of the electors registered therein is valid, the election being for the new district thus formed; and the fact that one or several of the districts incorporated had voted against the proposed tax does not invalidate it. The sections of the Consolidated Statutes requiring the separate approval of the voters of the nonspecial school-tax territory have no application. *Ibid.*

4. *Same—Constitutional Law—Statutes.*—Where nonspecial school-tax districts have been combined into a school-tax district with special school-tax districts, the nonspecial tax districts cannot maintain the position that it was necessary to the valid imposition of a special tax for school purposes within the district thus created that the voters within each nonspecial tax district should approve it. Article 18, chapter 136, Public Laws 1923, otherwise providing, the Legislature having almost unlimited constitutional authority over these local agencies of government, and may at any time change and combine them, irrespective of territorial limits, by safeguarding certain restrictions imposed by the Constitution. *Ibid.*

5. *Schools—County-wide Organization—School Districts—Consolidation—Statutes.*—The statute, chapter 136, Laws 1923, is a codification, with certain modifications or changes, of the then existing school laws of the State upon a county-wide plan of organization designing to make them more harmonious and efficient under a workable system for the counties adopting it. *Blue v. Trustees*, 431.

6. *Same—Taxation—Bonds.*—Where a county has adopted the statutory county-wide plan of organization for its public-school system, its board of education is empowered to establish new school districts or to consolidate or enlarge existent districts and to provide for levying of local taxes therein and issuing bonds when authorized by orders and election had as directed by articles 16, 17, 18, and 22 of the act. *Ibid.*

7. *Same—Enlargement of Existing Districts.*—While, under article 18 of the county-wide plan for the organization of public schools, the public authorities are restricted to districts having established or recognized boundaries (section 234), under the authority of article 17 elections may be had, among other things, for enlarging an established district by including adjoining territory and levying a tax thereon, on petition of the governing board of the principal district, and upon approval of the voters of the outside territory to be added as indicated in section 226 of the statute. *Ibid.*

8. *Same — Elections — Approval of Voters.*—While special-charter school districts do not as a rule come within the compulsory regulations of the public-school authorities unless or until they have surrendered their special charter (chapter 136, Laws 1923, sec. 157), the school authorities, under section 226, are empowered to enlarge one of these districts having a special tax by adding outside adjoining territory, so that it comes under the governing authorities of the special-charter district thus enlarged when the approval of the voters of the out-

SCHOOLS—*Continued.*

lying territory proposed to be added have approved thereof at an election held for the purpose, as directed by the statute (C. S., 5530, revised). *Ibid.*

9. *Same—Constitutional Law.*—Under the provisions of the statute providing for a county-wide system of education, the school board, by proper procedure, is authorized to divide an existent school district therein (chapter 136, Laws 1923, article 6) and the statute in relation thereto is constitutional and valid, with the limitation that provision be presently and ultimately made for proper school facilities for the children therein. *Sparkman v. Comrs., ante*, 241, cited and approved. *Ibid.*

10. *Same—Abolition of Existing Districts.*—Where, in accordance with the provisions of chapter 136, Laws 1923, an existent special charter tax district has been enlarged to take in added and adjoining territory, it is not required that such district should have first been abolished to make the consolidation valid, according to sections 227, 228, the requirements of these sections being intended to provide for the abolition of local-tax districts when that was the single question presented. *Ibid.*

11. *Schools — Education — Counties — Statutes — Discretionary Powers — Courts.*—The county board of education is given discretionary powers by statute to direct and supervise the county school system for the benefit of all the children therein, including the duty, among others, of selecting a school site, with which the courts will not interfere, in the absence of its abuse. *McInnish v. Board of Education*, 494.

12. *Same—School Sites—Trial by Jury—Constitutional Law.*—The right to trial by jury upon an issue involving the exercise by a county board of education in its selection of a site for a public-school building therein, conferred by Public Laws 1923, ch. 136, is not given by Article XIX, section 1, of the State Constitution. *Ibid.*

13. *Schools — Consolidation—Taxation—Bonds—Statutes.*—C. S., 5526, applies primarily to the consolidation of nonspecial school-tax territory; and in order to consolidate existent school-tax districts having different rates, by extending the limits of some of them to include others, section 5530 requires that a majority of the committee or trustees of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid. *Jones v. Board of Education*, 557.

14. *Same.*—Where the consolidation of existing school districts with various rates of taxation attempted under the provisions of C. S., 5530, is invalid, an election thereafter held under the provisions of C. S., 5473, as amended by Laws 1921, ch. 179, sec. 1, cannot relate back and validate the consolidation and the tax to be levied and bonds to be issued thereunder. *Ibid.*

15. *Schools — Salaries — Statutes — Counties—Trial by Jury—Appeal and Error.*—Under the provisions of chapter 136, Public Laws 1923, a method is fixed whereby, upon disagreement as to the amount of

SCHOOLS—*Continued.*

salary fund between the county board of education and county commissioners, the matter be referred to the clerk of the Superior Court of the county, with right of appeal to the judge: *Held*, error for the latter to refuse the motion of the board of county commissioners for a jury trial thereon, as expressly provided by section 188 of said chapter. *In re Board of Education*, 710.

16. *Schools—Taxation—Consolidation of Special Tax with Nonspecial Tax Districts — Equal Benefits — School Terms—Statutes.*—The authority given the board of education to create special school taxing districts, in which, after the boundaries are defined and recorded, an election on the question of a special tax may be held as the act requires, is to equalize in the district so formed the advantages which the schools afford; and where a special district has approved, at an election held for the purpose, a special tax to continue its schools beyond the six-months period required by the Constitution, and has later been combined into a district with others having no special tax, or without an election held for the purpose of voting a special tax under the consolidation, the position may not be maintained by the special-tax district, thus consolidated, that it may exclusively use its special tax for the continuance of its own school term beyond that of the other portions of the district thus consolidated. *Bivens v. Board of Education*, 769.

17. *Schools—Bonds—Taxation—In What Name Bonds to Be Issued—Statutes.*—Chapter 136, Public Laws 1923, was passed to make a uniformity of issue of bonds by school districts for the acquisition and maintenance of its buildings, etc., for school purposes, and, to effectuate its purpose, prescribed that the bonds so issued shall be in the name of the county, payable exclusively out of the taxes to be levied in the districts solely benefited; repealing in this respect the provisions of the statute of 1921; and such bonds issued contrary thereto are void. *Comrs. of Edgecombe v. Prudden*, 794.

SCHOOL DISTRICTS. See Schools, 2, 5, 7, 10.

SELF-DEFENSE. See Criminal Law, 10.

SENTENCE. See Judgments, 11.

SERVICE. See Summons, 1.

SETTLEMENT. See Guardian and Ward, 1, 3.

SHAREHOLDERS. See Corporations, 2, 3.

SHIPMENTS. See Carriers, 6.

SIGNALS. See Carriers, 7; Negligence, 3.

SIGNATURES. See Pleadings, 7; Principal and Agent, 6.

SPECIAL LAWS. See Statutes, 2.

SPECIAL VENIRE. See Criminal Law, 17.

SPECIFIC PERFORMANCE. See Evidence, 10; Pleadings, 4; Equity, 1; Contracts, 8.

SPENDTHRIFTS. See Trusts, 2.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STATE COURTS. See Railroads, 8.

STATE HIGHWAYS.

1. *State Highways — Highways — Statutes — Commerce.*—Construing the preamble with section 16 of chapter 2, Public Laws 1921, known as the State Highway Act, the Legislature considered it necessary to connect the principal towns and county-seats of the State, having hard-surfaced streets, with the State highway system of public roads, for the development of the State's agricultural, commercial and industrial industries. *Short v. Monroe*, 676.

2. *Same — Cities and Towns — Municipal Corporations—Streets—Assessments—Costs.*—Where a city or incorporated town, having three thousand inhabitants, or more, has a considerable portion of its streets hard-surfaced, the municipality may voluntarily assess and undertake the improvement of a street being a connecting link in the highway system. *Ibid.*

3. *Same—Petition—Assessments.*—Where the State Highway Commission orders a connecting link to be hard-surfaced, and the municipality voluntarily agrees to make the improvement, it is not required, under chapter 56, article 9, that a petition of the abutting owners of land thereon be made. Section 16, *supra*, gives the governing body of the municipality power to make it an assessment district. *Ibid.*

4. *Same.*—The assessment of the owners of land for hard-surfacing the streets of a city or incorporated town necessary to form a connecting link with the other streets already thus improved by assessment preserves the equalization of assessments. *Ibid.*

5. *Same—Benefits.*—It is a matter of common knowledge that the streets of a city or incorporated town forming a connecting link with the State system of highways will increase the value of the land abutting thereon in greater proportion than the lands along the other streets not so situated. *Ibid.*

STATUTES. See Banks and Banking, 1, 6, 7; Constitutional Law, 1, 2, 4, 9, 10, 11, 13, 14; Deeds and Conveyances, 1, 2, 13; Municipal Corporations, 1, 6; Removal of Causes, 2, 4, 9; Wills, 8, 11, 25; Schools, 1, 2, 4, 5, 13, 15, 16, 17; Contracts, 1, 13, 16; Tenancy in Common, 2, 5; Trusts, 2; Admiralty, 1; Criminal Law, 5, 11, 13, 14, 20, 22; Corporations, 3, 5; Railroads, 11, 14; Taxation, 2, 6, 10, 12; Instructions, 3; Intoxicating Liquor, 1; Judgments, 3, 12; Appeal and Error, 12; Corporation Commission, 1; Liens, 1, 3, 4, 5; Partnership, 1, 5; Evidence, 28, 29, 37, 41; Homicide, 5; Juvenile Courts, 1; Pleadings, 3, 8, 11, 12, 13, 16; Ejectment, 1; Mortgages, 5; Sales, 1; Easements, 4; Limitation of Actions, 1, 2; Husband and Wife, 1; Actions, 2, 3; Negligence, 2; Jury, 4, 7; Bills and Notes, 7; Estates, 5; Abandonment, 1; Employer and Employee, 2; Counties, 2; State Highways, 1.

1. *Statutes — Federal Employers' Liability Act — Commerce — Intrastate Commerce.*—The Federal Employers' Liability Act, in relation to interstate commerce, has no application where the defendant railroad company's employee was at the time engaged in his employment as a

STATUTES—*Continued.*

brakeman in defendant's freight yard, and, at the time complained of, his duties were in connection with an intrastate train, though trains engaged in interstate commerce were also made up in these yards. *Barbee v. Davis*, 79.

2. *Statutes — In Pari Materia — Special Acts — Interpretation—Intent.*— While a special act of the Legislature, passed at the same session, construed *in pari materia* with a general law upon the same subject-matter, will ordinarily be interpreted as an exception thereto, this interpretation will give way to the true intent of the Legislature as gathered from the language of both acts, so construed. *Blair v. Comrs. of New Hanover*, 488.

3. *Same—Counties—Bonds—Courthouses—Jails.*—A local act of the Legislature authorized a certain county to issue bonds for the building of an annex to its courthouse and for the erection of a new county jail, and at the same session passed a general law, applicable to all of the counties of the State, enlarging the amount of bonds to be issued for these purposes, expressing that it was in addition to, and not in substitution of, any existing powers contained in any other law: *Held*, no conflict in the provisions of the two acts, and the county could issue valid bonds for the specific purpose to the extent authorized by the general law, under the provisions thereof. *Ibid.*

4. *Statutes — Interpretation — In Pari Materia—State Highways—Highways—Cities and Towns—Municipal Corporations.*—Chapter 56, article 9, providing for local improvements of the streets of a city or incorporated town by a method of assessing the owners of abutting land, and the State Highway Act (chapter 2, section 16, Public Laws 1921), are to be construed together *in pari materia*. *Shute v. Monroe*, 676.

STATUTE OF FRAUDS. See Evidence, 7; Principal and Agent, 6.

Statute of Frauds—Promise to Answer for Debt of Another—Evidence—Motions—Nonsuit—Questions for Jury.—It does not require a writing within the statute of frauds to answer for the debt, default, or miscarriage of another (C. S., 987), where the promissor directly assumes the debt or has a pecuniary interest therein; and where a landlord has obtained supplies to be furnished to his tenant within the coming crop year, upon his promise to see that the tenant pay for them, it is sufficient to deny the promissor's motion to nonsuit in an action against him by the furnisher of the supplies to recover for their payment. *Taylor v. Lee*, 393.

STENOGRAPHER. See Evidence, 33.

STIPULATIONS. See Carriers, 4.

STOCK. See Contracts, 2; Corporations, 1, 5; Taxation, 2; Gaming, 1.

STOPPAGE IN TRANSITU. See Carriers, 2.

STREET RAILROADS. See Railroads, 11.

STREETS. See Municipal Corporations, 1, 6, 7, 9; State Highways, 2.

SUBCONTRACTORS. See Liens, 3, 5.

SUBROGATION. See Equity, 2, 5.

SUBSCRIPTION. See Corporations, 5.

SUIT. See Carriers, 4; Principal and Surety, 1; Actions, 3, 4.

SUMMONS.

Summons — Service — Process—Publication—Nonresidents—Judgments in Personam—Special Appearance—Jurisdiction—Judgments Set Aside.— Where a nonresident defendant of this State has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of our statute (C. S., 411) may not be rendered against him *in personam* in an action for debt; and where so rendered, it will be set aside upon special appearance of his attorney who moves therefor upon the ground of improper service and the want of jurisdiction of our courts. *Bridger v. Mitchell*, 374.

SUPERIOR COURTS. See Pleadings, 9, 14; Estates, 5.

SUPPORT. See Husband and Wife, 1; Deeds and Conveyances, 7.

SURVIVAL. See Negligence, 2.

SURVIVORSHIP. See Wills, 12.

SUSPENSION. See Judgments, 11.

TAXATION. See Schools, 1, 2, 6, 13, 16, 17; Constitutional Law, 11; Corporations, 1; Criminal Law, 14, 15; Counties, 1; Municipal Corporations, 7, 8.

1. *Taxation — Licenses — Automobiles—Principal and Agent—Vendor and Purchaser.*—State agencies for the sale of automobiles and motor trucks are required to pay a license tax of $500, which includes all employees at the headquarters of the business in this State. Subagencies operating at a separate place of business, other than such headquarters, are required to pay a license tax of $5 for each subagency, which includes all employees thereat who do not make or solicit sales outside of their respective locations, but not to outside salesmen. The latter are required to carry with them a duplicate license, at a cost of $5 to each, to show their authority to sell under license issued to their headquarters. Sections 22 and 78, chapter 4, Laws 1923. *Automotive Assn. v. Cochran*, 25.

2. *Taxation — Statutes — Corporations — Shares of Stock — Transfer of Shares—Inheritance.*—Under the provisions of C. S., 7772, an inheritance or transfer tax is imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in a corporation of another State domiciled here, under the laws of this State, as a condition precedent to the right to have said stock transferred on the books of the corporation having the statutory proportion of its property located within this State and conducting its business here. *Trust Co. v. Doughton*, 263.

3. *Same—Constitutional Law.*—The provisions of C. S., 7772, imposing, among others, an inheritance tax upon nonresident distributees under

TAXATION—*Continued.*

the will of a nonresident testator or upon his distributees under the canons of descent, who are nonresidents, in a corporation domesticated and operating with two-thirds of its property here, under our statute, are not in conflict with Article I, section 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

4. *Same—Property—Valuations.*—The tax imposed upon the transfer of shares of stock in a corporation domesticated under our statute, where the decedent and the legatees or distributees are all nonresidents, is upon the right of succession or on the right of a legatee to take under a will or by a collateral distribution in case of intestacy, and is not a tax on tangible property merely because the amount of the tax is measured in its relation to the value of the corporate property as a whole, and is regarded as in the nature of a ransom or toll levied upon the right to transmit or receive the shares occasioned by the death of the former owner. *Ibid.*

5. *Taxation — Counties — Necessary Expenses—Constitutional Law.*—The building of bridges on the public roads, and county homes, and their maintenance, are necessary expenses of the county, under the provisions of Article VII, section 7, State Constitution. *R. R. v. Reid*, 320.

6. *Same—Statutes—Special Approval.*—Article V, section 6, of the State Constitution, as amended, authorizes the Legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. *Ibid.*

7. *Same—Supplementing General Funds of the County.*—An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitation by Article V, section 6, of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. *Ibid.*

8. *Same—Government Agencies.*—Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied (Const., Art. V, sec. 7), nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. *Ibid.*

9. *Same—Records of Board—Collateral Attack—Correction of Records—Parties — Appeal and Error — Remand.* — The clerk of the Superior Court is *ex officio* clerk of the board of county commissioners and required to correctly record all of its proceedings; and while the record of the board so made as to the levy of a tax may not be impeached in a suit brought by a taxpayer against the sheriff to enjoin the collection of the tax, upon the ground of its unconstitutionality, it may be corrected *nunc pro tunc* by the board of commissioners itself to speak the truth, and this case is remanded, to the end that the commissioners may be made a party to that end. *Ibid.*

TAXATION—*Continued.*

10. *Taxation—Trades—Classification — Legislative Discretion—Statutes.*—The Legislature has power to tax trades, etc., and the right of classification is referred largely to the legislative discretion, with the limit that its exercise must not be palpably arbitrary. *S. v. Elkins*, 533.

11. *Same—Garage—Automobile Repairing.*—Chapter 4, Schedule B, sec. 77, of the Revenue Act of 1923, imposing a license tax on the business of maintaining a garage, defining it to be "any place where they are repaired or stored," includes within its terms one who, personally, and without employed assistance, only repairs automobiles for a living, on a place on the premises with his own dwelling, and the statute is a valid exercise of the legislative discretion. *Ibid.*

12. *Taxation—Statutes—Penalties.*—The taxes to be paid by a railroad and other like corporations direct to the State are due and payable within thirty days from date of receipt of the assessment and levy (section 67a, chapter 92, Public Laws 1920), subject to a penalty of 25 per cent of the amount of the taxes if not so paid, except in instances of appeal. *R. R. v. Lacy*, 615.

13. *Same—Municipal and State Purposes.*—The discount allowed to corporations paying their taxes before 30 November, and the penalty after 1 December, under the provisions of section 88, chapter 92, Public Laws 1919, relate to county and other like municipal corporations, and this is not in conflict with section 67a, chapter 92, Public Laws 1920, as to the taxes to be paid by such corporations direct to the State Treasurer for State purposes. *Ibid.*

14. *Same—Constitutional Law—Class Discrimination.*—The provisions of the Laws of 1919, and those of 1920, requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, etc., is a uniform legislative classification, applying equally to all within its terms, and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by our Constitution, Art. V, sec. 3. *Ibid.*

TECHNICALITIES. See Indictment, 2.

TELEPHONES. See Deeds and Conveyances, 14.

TENANCY. See Contracts, 1.

TENANCY IN COMMON. See Wills, 12; Estates, 4.

1. *Tenants in Common—Adverse Possession—Outstanding Title—Trusts.*—Where the original enterer upon State's lands has acquired the right to a grant of land which has not been issued to him, and after his death his son remains in possession and continuing to claim under him, obtains the grant in his own name, pays the taxes, etc.: *Held*, his possession is that of a tenant in common with the other heirs at law of the deceased ancestor under whom all claim, and the possession under the outstanding title he has thus obtained cannot operate for his exclusive benefit. *Gentry v. Gentry*, 29.

2. *Same—Limitation of Actions — Statutes—Possession—Ouster.*—Where one tenant in common in possession has obtained for himself the outstanding title to the *locus in quo*, equity will declare him to have

TENANCY IN COMMON—*Continued.*

purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession (C. S., 445), in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. *Ibid.*

3. *Same—Evidence—Questions for Jury.*—Where a tenant in common in possession has declared that he was holding the possession for the benefit of all, the evidence is sufficient to take the case to the jury. *Ibid.*

4. *Same—Deeds and Conveyances—Sale—Proceeds.*—Where a tenant in common in possession has acquired the outstanding title and has sold the land, the principle upon which equity impresses a trust on the land for the benefit of the cotenants is applicable to the proceeds of the sale so made. *Ibid.*

5. *Tenants in Common—Possession—Title—Bond—Statutes—Pleadings.*—A tenant in common in possession, claiming title, holds such possession for his cotenants by one common title, and in an action to recover the lands he comes within the meaning of C. S., 495, and must file the bond therein required, according to law, before answering the complaint. *Battle v. Mercer*, 438.

6. *Tenants in Common—Courts—Jurisdiction—Title—Clerks of Court.*—While the title to lands is not involved in proceedings among tenants in common to partition lands unless put in issue, the effect of the clerk's order for division is to vest the title in each tenant in the lands apportioned to him; and after the apportionment of the lands have been made, in proceedings for partition among tenants in common before the clerk, without appeal, a lease by one of the tenants can only affect that portion which has been allotted to him. *Bank v. Leverette*, 743.

7. *Same—Writ of Assistance—Equity—Writ of Possession—Petition and Affidavit.*—A writ of assistance to put the owner of lands in possession which is wrongfully being withheld from him, contrary to the judgment of the court rendered in the proceedings, is one cognizable only in a court of equity and not within that of the clerk of the court in proceedings to partition lands among tenants in common; but where, after the division of the lands has been finally made, without appeal, he may issue a writ of possession to that effect; and where it may be seen from the substance of his petition and affidavit that the legal remedy is applicable, this writ may be issued, though therein spoken, if as a writ of assistance, the effect being practically the same in both instances. *Ibid.*

8. *Same — Appeal — Derivative Jurisdiction — Constitutional Law.* — The clerk of the Superior Court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, when one of the tenants wrongfully withholds possession from another, nor can jurisdiction be conferred on the Superior Court on appeal, the latter having no concurrent or original jurisdiction, under the provisions of the statute (C. S., 637), valid under the provisions of the Constitution of 1875. *Ibid.*

TENANCY IN COMMON—*Continued.*

9. *Same—Judgments—Estoppel.*—In proceedings to partition lands among tenants in common, the adjudication before the clerk of the Superior Court operates as an estoppel as to them and those in privity with them, when no appeal has been taken. C. S., 3231. *Ibid.*

TENANCY BY THE CURTESY. See Wills, 11; Mortgages, 2.

TENDER. See Mortgages, 4.

TERMS. See Judgments, 2; Removal of Causes, 5; Schools, 16.

TERRITORY. See Contracts, 22.

TESTAMENTARY CAPACITY. See Wills, 3.

TIME. See Pleadings, 13.

TITLE. See Carriers, 2, 5, 6; Municipal Corporations, 2; Pleadings, 15; Tenancy in Common, 1, 5, 6; Estates, 1, 3; Appeal and Error, 12; Wills, 19; Ejectment, 2; Fires, 1; Bills and Notes, 6; Deeds and Conveyances, 13.

TOOLS. See Employer and Employee, 1.

TORTS. See Railroads, 4, 7.

TRADES. See Taxation, 10; Criminal Law, 14, 15.

TRANSACTIONS WITH DECEDENTS. See Partnership, 2.

TRANSFERS. See Taxation, 2.

TRESPASS. See Railroads, 1, 6; Criminal Law, 21; Fires, 1.

TRIALS. See Banks and Banking, 6, 9; Instructions, 2; Injunctions, 2; Negligence, 1; Appeal and Error, 5, 7; Evidence, 10, 12, 33, 37; Criminal Law, 6; Partnership, 3; Jury, 8; Employer and Employee, 2; Schools, 12, 15.

TRUSTS. See Deeds and Conveyances, 4; Tenancy in Common, 1; Wills, 1, 7, 15, 16, 21, 25; Contracts, 1; Guardian and Ward, 4.

1. *Parol Trust—Quantum of Proof.*—In order to ingraft a parol trust upon a deed which is absolute in form, the proof must be clear, cogent and convincing. *Gillespie v. Gillespie*, 40.

2. *Trusts—Spendthrift Trusts—Statutes.*—C. S., 1742, authorizing a spendthrift trust, is limited to an annual income not to exceed $500 a year net, and has no application to the facts of this case. *Bank v. Heath*, 54.

USE AND OCCUPATION. See Easements, 1, 3.

USURY. See Injunctions, 9.

VALUE. See Taxation, 4.

VENDOR AND PURCHASER. See Taxation, 1; Equity, 1; Carriers, 6; Principal and Agent, 2; Fires, 1; Contracts, 21.

1. *Vendor and Purchaser—Deeds and Conveyances—Warranty—Fraud—Questions for Jury.*—The plaintiff contracted to sell the defendant his farm, and implements therefor, in contemplation of the latter's pos-

VENDOR AND PURCHASER—*Continued.*

session for the purpose of cultivating it, and delivered to him a deed, with full covenants and warranty. In an action to recover upon the purchase-money notes there was evidence tending to show that defendant was induced to purchase by plaintiff's false representations as to existing liens on the land, which resulted in a receiver, appointed at the suit of the lienors, and the prevention of the defendant's possession and the loss of his title: *Held*, sufficient to take the issue of fraud to the jury. *Forbes v. Deans*, 164.

2. *Vendor and Purchaser—Contracts—Performance—Bargain and Sale.*—Where the acceptance of an offer of purchase of cotton at the then market price is made conditional upon the prompt action of the proposed purchaser in examining samples sent him, with no time limit definitely fixed, and there is evidence of his delay on a rising market beyond a reasonable time in which such purchaser could have acted, the question as to whether there was a complete contract of bargain and sale is one for the jury, and defendant's motion as of nonsuit thereon should be denied. *Mills v. McRae*, 707.

3. *Same—Damages.*—Ordinarily, the measure of damages caused by the vendor's breach of contract in failing to deliver cotton to the vendee, on a rising market, is the difference between the contract price and the reasonable market price at the time when and at the place where the cotton should have been delivered, according to the time fixed therefor by the terms of the contract. *Ibid.*

4. *Same — Minimizing Damages — Evidence—Burden of Proof.*—Where, upon a rising market, there is no definite time fixed for the acceptance by the purchaser of cotton at the price at the time of the offer, and the question of the reasonableness of the time of the acceptance arises in the case, upon notice at a later time by the seller that he regarded the proposal of sale at an end for failure of acceptance, and that he would not ship the cotton at the price named, it is required of the proposed purchaser, in the exercise of ordinary care and prudence, that he minimize the loss of the proposed seller by buying the cotton, of the same quantity and grade, at the price prevailing on the open market after the time of notice given, with the burden of proof in this respect upon the proposed seller that he could reasonably have done so. *Ibid.*

VENIRE DE NOVO. See Evidence, 38.

VENUE. See Actions, 2; Wills, 27.

VERDICT. See Deeds and Conveyances, 3; Appeal and Error, 5, 6; Intoxicating Liquor, 2; Homicide, 5.

1. *Verdict—Indictment—Several Counts.*—A general verdict of guilty on all the related counts in a bill of indictment is a verdict of guilty as to each, and will be sustained if the evidence thereon is sufficient for conviction. *S. v. Switzer*, 90.

2. *Verdicts—Correction—Courts.*—It is within the sound legal discretion of the trial judge to permit a jury, before its discharge, at the instance of its members and without suggestion from others, to reassemble as the jury in the case, and correct an error in calculation as to damages in their verdict, so as to make it conform to the true

VERDICT—*Continued.*

verdict they had theretofore agreed upon. The principle upon which a jury is not allowed to attack a verdict they had previously rendered is distinguished. *Lumber Co. v. Lumber Co.*, 417.

VERIFICATION. See Pleadings, 7.

VESSELS. See Admiralty, 2.

VESTED INTERESTS. See Wills, 1, 11.

VICE-PRINCIPAL. See Pleadings, 20.

VOLUNTARY NONSUIT. See Appeal and Error, 17.

VOLUNTARY STATEMENTS. See Evidence, 22.

VOTERS. See Schools, 8; Counties, 1.

WAIVER. See Insurance, 2; Pleadings, 2; Banks and Banking, 11; Evidence, 28; Appeal and Error, 16; Removal of Causes, 3; Judgments, 14.

WAR. See Railroads, 16.

WARRANTY. See Principal and Agent, 2; Vendor and Purchaser, 1.

WATERS.

Waters—Riparian Owners—Diversion of Flow—Lower Proprietor—Damages — Easements — Municipal Corporations—Cities and Towns.—A riparian owner is entitled to the natural flow of a stream of water running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by a reasonable use of the water by other like proprietors, as a right, not as an easement, inseparably annexed to the soil; and *held*, a city or town that causes damage to the lower proprietor by damming the stream and diverting the use of the waters for the use in connection with its sewer system and for its inhabitants, is liable in damages, though the lower proprietor may not, at the time, be using the stream for any purpose. *Smith v. Morganton*, 801.

WAY OF NECESSITY. See Easements, 4.

WIDOW. See Husband and Wife, 1.

WILLS. See Constitutional Law, 1; Estates, 1, 3, 4.

1. *Wills—Intent—Trusts—Estates—Vested Interests—Executors and Administrators.*—A devise or bequest to each of the sons of the testator of his designated proportionate part of the residue of an estate to be held in trust by the executors and payment made to them in certain proportions biennially, giving the trustees discretion in withholding the payments upon certain contingencies, without limitation over upon their happening; but that they should continue to invest the estate and pay the net profits over to the designated sons respectively: *Held*, the testator's intent is construed to vest the interest of the sons in each of them respectively. *Bank v. Heath*, 54.

2. *Same — Debtor and Creditor — Judgments — Execution.* — Where, as gathered from the will, the intent of the testator is to vest in each of his designated sons his share in the division of the residue of his

WILLS—*Continued.*

estate, his direction to his executors and trustees under the will to withhold the share of each for want of business capacity or judgment, and continue to invest and pay the net profits thereof to the sons named, exclusively for their use, without reservation, is inoperative as to the rights of the creditors of the sons; and such interests are subject to execution under a judgment against them. *Ibid.*

3. *Wills—Testamentary Capacity—Evidence—Letters of Testator.*—While the courts allow wide range in allowing in evidence testimony of non-expert witnesses as to the testator's mental capacity sufficient to make a valid will, upon caveat thereof, it does not extend to letters sought to be introduced in evidence thereof, the contents of which are not supported by the testimony of a witness, but rests alone upon the evidence that they were in the handwriting of the testator. *Hyatt v. Hyatt*, 113.

4. *Wills—Revocation—Later Wills—Evidence—Burden of Proof.*—Where the caveators of a will seek to set aside the will being propounded, on the ground that the testator had made a later will revoking it, the burden is on them to show the making and present existence of the later will, and that it revoked the one theretofore made. *Ibid.*

5. *Same—Presumptions.*—Where the caveators to a will have shown the existence of a later will which, they contend, revoked the will being propounded, which was last seen in the possession of the testator and after his death cannot be found, it will be presumed that he had destroyed it with his intention to revoke it. *Ibid.*

6. *Wills—Interpretation—Intent.*—A will should be interpreted to conform to the lawful intent of the testator as gathered from it as a whole. *Wells v. Williams*, 134.

7. *Same — Life Estates—Estates in Remainder—Fee Simple—Executors and Administrators—Trusts—Discretionary Powers.*—A devise to the husband by his wife of her lands to be used and controlled by him and for him to receive the rents and profits during his life, with right to call upon the executor to sell so much of the lands as would be necessary for his maintenance in comfort during his life, and the right of the executor to sell and convey the lands, or so much thereof as may be necessary for the purpose stated, with remainder of the lands not so disposed of limited over to designated beneficiaries, does not, from the intent of the testatrix as gathered from the will, construed as a whole, vest only a life estate in the husband, unaffected by the further provisions of the will, or vest in the remaindermen an absolute fee-simple title to all of the lands upon the death of the husband; and *held*, further, it was in the sound discretion of the executor, fairly exercised, to make the conveyance when so called upon to do by the husband, in pursuance of the terms of the will. *Ibid.*

8. *Wills — Caveat—Issues—Procedure—Statutes.*—Where a caveat to a will is duly filed, with the required bond, etc., at the same time the paper-writing is offered for probate, it is required of the clerk to transfer the proceedings to the civil-issue docket for the trial of the issue of *devisavit vel non*, and all further steps are stayed in the

WILLS—*Continued.*

matter until its final adjudication, except such as may be necessary for the preservation of the estate. C. S., 4158, 4159, 4161, 24. *In re Little*, 177.

9. *Same—Collector.*—Where a caveat to a will is duly filed and further proceedings stayed, it is discretionary with the clerk to appoint as collector for the preservation of the estate the one named in the paper-writing as executor, or some other to act as collector for that purpose. C. S., 24. *Ibid.*

10. *Same—Limitation of Actions.*—The effect of the amendment of 1907 was to limit the time in which a caveat to a will may be filed, and does not affect the time within that period when the same may be done, or the further proceedings under the statute applicable. C. S., 4158. *Ibid.*

11. *Wills — Descent and Distribution — Statutes—Estates—Remainders—Tenancy by the Curtesy—Vested Interests.*—A devise of land to testator's two daughters for life, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest: *Held*, upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. Canons of Descent, Rule 12. *Allen v. Parker*, 376.

12. *Same—Husband and Wife—Tenancy in Common—Survivorship—Jus Accrescendi.*—Upon the death of a minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grandfather's will, without brother or sister or issue of such, the inheritance is cast under Rule 6 of the Canons of Descent before the amendment of 1915, upon the father, if living, the amendment having the effect of making the father and mother tenants in common, with the right of survivorship. *Semble*, under the amendment the devise of these lands of the wife vests her interest in the husband. *Ibid.*

13. *Wills — Interpretation — Intent — Several Items — Estates—Residuary Clauses.*—An estate in item 1 of a will to testator's mother and sisters and brothers as residuary legatees in equal shares, his heirs at law, and in item 2 to his heirs that may be living at the time of his death: *Held*, these two items will be construed together to effectuate the testator's intent, which is not to enlarge the number of the heirs specified in item 1, or to let in his grandchildren, being the children of such of the testator's children as were dead at the time of his death. *Royal v. Moore*, 379.

14. *Same—Insurance—Election of Benefits.*—Where the testator has included the proceeds from his life insurance policies in the residuary clause of his will, such of his children who are named beneficiaries under the policies who elect to take as such beneficiaries cannot take under the residuary clause wherein they are named with the testator's other children to take an equal part. *Ibid.*

15. *Wills — Estates—Contingent Remainders—Defeasible Fee—Trusts.*—A devise of lands in equal parts to the testatrix's four daughters and her son, W., with the "exception" each one of them to give the daughter, A., $200 apiece of their portion, and what S. gets to be controlled

WILLS—*Continued.*

by the son, W., to give S. a home for herself and children, and at their death to go to her brothers and sisters: *Held*, the testatrix's own daughter, S., and not her children, was the primary object of the testatrix's bounty; and her controlling intent, as ascertained by proper construction from the language used, was to give S. a fee in her part of the lands devised, defeasible on her dying without a child or children surviving, and in that event with remainder over to the brothers and sisters of S., the children of the testatrix, without creating an active trust for the benefit of her daughter, S. *Greene v. Lyles*, 422.

16. *Wills — Devise — Estates—Limited Use—Remainders—Trusts—Powers of Sale—Equity—Injunction.*—A devise of lands to the testator's widow for her to have and use it as she needs, and make such disposition thereof as will be best for her welfare, and at her death to the children of the marriage: *Held*, the widow holds the land in trust for the children, who take in remainder so much thereof as the widow may not have required for her needs during her life, and otherwise there is no authority vested in her under the power of sale. *Semble*, upon a petition to the court, the remaindermen may restrain a sale of the lands in violation of the trust imposed. *Teague v. Current*, 483.

17. *Wills—Intestacy—Presumptions.*—While there is a presumption that a testatrix intended to dispose of her entire estate by will, it must give way when by the plain language of the will it appears by its interpretation as a whole that she omitted from the will a part of her estate, as to which she had died intestate. *Kidder v. Bailey*, 505.

18. *Same—Descent and Distribution.*—Where the testatrix died seized of an inheritance derived from her mother, consisting of lands, stocks, etc., and also of an estate or property otherwise so held, and devised all of the property derived by her from her mother and other certain shares of stock to her two sisters, without residuary clause or other disposition by her will, interpreting the will as a whole, *it is held* that, by the clear language of the will, admitting of no extrinsic aid of interpretation, she died intestate as to all property not derived by her from her mother except the stock named, and the residue of her estate descended upon her heirs at law. *Ibid.*

19. *Wills—Devise—Power of Sale—Deeds and Conveyances—Title.*—A devise of the testatrix of her home to her three sons, who survived her as her only heirs at law, upon condition that it be kept as a home for all, except in the event they fully consented to sell it, and upon the death of one of them his share to revert to the living ones for an equal division: *Held*, the controlling intent of the testatrix was not to make an absolute restraint on alienation, or to continue the home until the death of the last survivor, but that upon the death of one the house could be sold and conveyed with the consent of the surviving sons. *Fleming v. Motz*, 593.

20. *Wills—Power of Sale—Deeds and Conveyances—Intent—Evidence.*—In order to make a valid conveyance of land devised with the power to sell without application to court, it is not now required that the devisee expressly refer thereto in her conveyance, if it is properly made to appear from the perusal of the entire deed that it was made in the exercise of the power conferred on her, or it can thus plainly

WILLS—*Continued.*

be inferred therefrom, and pertinent matters *in pais* can also be resorted to in aid of this interpretation; and *held*, further, the later deed of the devisee purporting to cure the supposed defect in the execution of the power by her former one would operate as an estoppel inuring to the grantee and those claiming title under him. *Matthews v. Griffin*, 599.

21. *Wills — Trusts — Charity—Indefiniteness of Beneficiary—Estates—Remainders—Descent and Distribution.*—A bequest of the income from the proceeds of sale of testatrix's entire estate to her son and granddaughter in certain proportions, and then to the survivor for life, with ulterior limitation to such objects of charity as the executor may consider as in accordance with her wishes, first the son and then the executor having predeceased the granddaughter: *Held*, an active trust is created, and, the *cy pres* doctrine not obtaining in this State during the life of the granddaughter, the ulterior limitation to charitable objects is void for indefiniteness, no discretionary power being thus given to the administrator with the will annexed, and at the death of the granddaughter the estate reverts to the testatrix's heirs at law, under the doctrine of resulting trusts. *Thomas v. Clay*, 778.

22. *Same—Education and Advancement.*—The income of an estate devised and bequeathed in trust, to be used for the education and "accomplishment" of the granddaughter of testatrix until she becomes twenty-one years of age, and then the income to be paid direct to her by the trustee named in the will, evidences the testatrix's intent that the trustee may use so much of the income during the minority of the beneficiary as in his sound judgment and discretion may be necessary for her food, raiment, education, and accomplishment. *Ibid.*

23. *Same—Lapsed Legacies—Devises.*—The executor, with power of sale, holding in trust under the terms of the will the proceeds from the sale of the property of the testatrix's estate in trust to pay the income to her son and daughter, may sell and convey a lapsed legacy in lands, and hold the proceeds under the trust imposed on him by the will. *Ibid.*

24. *Wills—Devise—Power of Sale—Married Women—Privy Examination.* Upon a devise of land to the several children of the testator, for them to divide among themselves, etc., it is unnecessary that one of them, a married woman, acting in accordance with the devise, have her privy examination taken in the mutual conveyance necessary for the division. *Dillon v. Cotton Mills*, 812.

25. *Wills—Devise—Trusts—Implied Power of Sale—Estates—Remainders.* Upon a devise of land in trust to the testator's son to use for himself and his named children the rents, issues, profits and interests, as they may be needed for the proper maintenance of himself and family and for the purpose of advancing his children and starting them in life, and authorizing him to advance to each thereof such money or property as he may deem proper for their best interest, provided there be no preference given among them, etc.: *Held*, whether the children held a contingent or vested interest, under the further terms of the devise to them, the trustee had the implied power to sell and convey the lands and hold the proceeds subject to the limitation imposed by the trust. *Ibid.*

WILLS—*Continued.*

26. *Same—Contingent Interests—Statutes.*—Where it appears by the record of the lower court and from the commissioner's deed that a sale of lands had been made affecting contingent interests in remainder, in pursuance of and in conformity with the statute on the subject, the fact that it was called in the case agreed a special "proceeding," and that the original papers have been lost from the clerk's office, will not affect the fact that it was a proceeding brought under the statute, and the validity of the sale thereunder will be upheld. *Ibid.*

27. *Wills—Caveat—Domicile—Venue—Husband and Wife—Presumptions—Findings of Fact—Appeal and Error.*—Upon motion for a change of venue in proceedings to caveat a will, the testatrix's legal domicile at the time of her death does not solely depend upon her residence in a different county from that of her husband, and where the trial judge, upon a case agreed, finds as a fact only that the testatrix, a married woman, was not a resident of the county of the domicile of her husband, and upon all the evidence in the case it appears that the change of venue sought was to the county of his domicile, the judgment of the trial court in retaining the jurisdiction will be reversed on appeal, and the proceedings ordered removed to the domicile of her husband. *In re Ellis*, 840.

28. *Same — Change of Domicile — Animus Revertandi.*—The question of domicile of a testatrix in proceedings to caveat her will does not solely depend upon her place of residence; and when all the evidence tends to show that her last residence was in a different county from that of her husband, proper venue of the proceedings is in the county of his domicile. *Ibid.*

WITNESSES. See Criminal Law, 1, 4, 6; Evidence, 13, 22, 25, 26, 33, 42.

WRIT OF ASSISTANCE. See Tenancy in Common, 7.

WRIT OF POSSESSION. See Tenancy in Common, 7.

WRITTEN INSTRUMENTS. See Bills and Notes, 3; Evidence, 6, 32.

WRONGFUL DEATH. See Negligence, 2; Evidence, 41.

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